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No. 00-___

In The

Supreme Court of the United States

MARGARET BOYAJIAN, CHARLES COUNSELMAN, AND JEAN DICKINSON,

Petitioners,

versus

THOMAS GATZUNIS, BUILDING INSPECTOR OF THE TOWN OF BELMONT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Massachusetts Dover Amendment, Mass. Gen. Laws ch. 40A § 3 (1997), which forbids local communities from applying zoning ordinances or by-laws that "prohibit, regulate, or restrict the use of land or structures for religious purposes," is not a permissible accommodation of religion, but rather a direct benefit for religion that violates the Establishment Clause of the First Amendment.

2. Whether the Belmont Zoning By-Law, which carries out the mandate of the Dover Amendment, violates the Establishment Clause.

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JURISDICTION

The First Circuit Court of Appeals decision was reached on May 2, 2000; the petition for rehearing en banc was denied on June 22, 2000. This Court has jurisdiction of this appeal under 28 U.S.C. § 1254 (2000).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Dover Amendment, Mass. Gen. Laws ch. 40A § 3 (1997), reprinted in the Appendix, *infra*, at 107a. The Establishment Clause of the First Amendment, U.S. Const. amend. I, cl. 1, reprinted in the Appendix, *infra*, at 106a.

STATEMENT OF THE CASE

This case arises out of a Massachusetts law that was enacted in 1950 for the purpose of redressing an instance

of discrimination against religious schools in Dover, Massachusetts. For the purpose of excluding Catholic parochial schools from its residential neighborhoods, in 1946, the town of Dover enacted a zoning by-law prohibiting the construction of such schools in residential areas. *See* Mass. Gen. Laws ch. 40A § 3 (1997). The Massachusetts legislature responded swiftly, not by making discrimination against religious uses illegal, but rather by enacting "An Act Prohibiting Discriminatory Zoning By-Laws and Ordinances," commonly referred to as the "Dover Amendment," which forbids the application of zoning laws to "the use of land or structures for religious purposes." Mass. Gen. Laws ch. 40A § 3 (1997).

Massachusetts thus responded to the plainly unconstitutional religious discrimination in the town of Dover by creating a statewide exemption that granted those using land or structures for religious purposes unilateral power to determine where they would locate in any municipality. As a result, every neighbor of religious property or structures in Massachusetts was deprived of a legal means of challenging the negative secondary effects, including noise, traffic congestion, and lighting, that are generated by large structures employed in multiple ways, including worship, education, marriage and funeral ceremonies, drug and alcohol rehabilitation, feeding the poor, homeless shelter, and senior or child day care. The power to determine whether a neighborhood was livable was taken out of the hands of the neighbors and placed in the hands of the churches.

Since 1950, the Dover Amendment has grown to serve as the catch-all provision encompassing any instance in which the state legislature has decided to

exempt a particular land use, for whatever reason, including "agriculture, horticulture, floriculture, and viticulture," solar panels, antenna structures, and day care facilities.[1] Mass. Gen. Laws ch. 40A, § 3. It also has

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[1] There is no rhyme or reason to the policy decisions of the Massachusetts legislature that can explain this grab bag of exemptions, and certainly no neutral and secular criterion that can encompass or explain all uses on the list. *See, e.g., Mitchell v. Helms*, 120 S. Ct. 2530, 2541 (2000) (Thomas, J., plurality opinion) ("if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.") (citation omitted), *id.* at 2557 (O'Connor, J., concurring in the judgment) ("I do not quarrel with the plurality's recognition that neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges. Our cases have described neutrality in precisely this manner, and we have emphasized a program's neutrality repeatedly in our decisions approving various forms of school aid. Nevertheless, we have never held that a government-aid program passes constitutional muster solely because of the neutral criteria it employs as a basis for distributing aid.") (citations omitted). If the criterion is simply to exempt those uses neighbors tend to oppose, the categorical exemption of all "religious purposes" is dramatically over-inclusive. While the evil of the town of Dover's discrimination in 1946 was plainly unconstitutional and unacceptable, it does not justify the sweeping benefit for all religious purposes provided by the Dover Amendment. In this case, neighbors oppose the negative secondary effects of large buildings, whether or not they are used for religious purposes. Religious uses could reap the benefit of neutral, secular exemptions along with other nonreligious uses covered by the same exemption, but that is not the law under review in this case.

been amended to permit the "reasonable" regulation of religious uses in a small number of categories:

> No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall such ordinance or by-law prohibit, regulate, or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the Commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a non-profit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setback, open space, parking, and building coverage requirements.

Id.

Since 1979, the Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints ("Church") has owned a parcel of property in Belmont, Massachusetts bordering a residential neighborhood. The Church built a meeting house on that property in the mid-1980s, and peacefully coexisted with its neighbors for many years.

On May 28, 1996, the Church applied for a special permit to exceed the City's height limitations for six steeples on a building of 94,000 square feet on the same parcel of property in the residential district.[2] On March

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[2] The final plan covered 68,000 square feet and featured one steeple. Appendix at 54a.

24, 1997, the Board approved the special permit application. *See* Appendix at 55a. Two disputes between the church and neighbors ensued flowing from the neighbors' belief that the temple would have negative secondary effects on their residential neighborhood. *See* Carey Goldberg, *Neighbors Opposing Temple Say Law Favors Religions*, N.Y. Times, Dec. 31, 1999, at A12 (Mormon Bishop Grant Bennett stated that he was convinced there was no prejudice among the residents, adding "I think the feeling would be equally strong if this were a school or elderly housing.").

First, a legal action was filed challenging the Board's decision regarding the height of the steeple in state court. *Martin v. Board of Appeals of the Town of Belmont*, No. 97 Civ. 2596 (Feb. 22, 2000). Second, on August 25, 1998, this action was filed in federal court by neighbors Margaret Boyajian, Charles Counselman, and Jean Dickinson, challenging the Dover Amendment, including its constitutionality under the Establishment Clause.[3]

Throughout the pendency of this lawsuit, the Church moved expeditiously to complete the temple, which was opened to the public recently, with 100,000 people expected to visit it in its first month. *See* Caroline Louise Cole, *Mormon Temple Opens, Braces for Rush of Tours*, Boston Globe, Aug. 30, 2000, at B14.

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[3] Petitioners also raised a challenge to the town of Belmont's zoning by-law that was passed for the purpose of conforming Belmont law to the Dover Amendment. *See Boyajian*, 212 F.3d at 3. If this Court were to find the Dover Amendment unconstitutional, the by-law would be invalid as well.

The District Court ruled that the Dover Amendment was constitutional under this Court's factors set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The lynchpin of the district court's analysis was a conviction that the Dover Amendment is a statute aimed at religious discrimination. The Court reasoned that: (1) the statute's legitimate secular purpose was the elimination of discrimination, (2) the primary effect of the law "is to reduce discrimination by local governments against entities which use land for religious purposes," and (3) the law does not effect an excessive entanglement between church and state. *Boyajian*, 1999 U.S. Dist. LEXIS 15610, at *19, *aff'd*, 212 F.3d 1 (1st Cir. 2000).

The Court of Appeals affirmed the District Court's decision over a dissent by Chief Judge Torruella. The majority reasoned that the Dover Amendment was "fully in line with the Court's approval of government actions aimed at lifting burdens from the exercise of religion." *Boyajian*, 212 F.3d at 8. The majority relied heavily on two law review articles that have pointed to a "phenomenon of churches being unwanted either in residential areas – because of increased traffic or noise, or impact on aesthetics – or in business zones – because tax-exempt churches dampen the vibrancy of commercial developments." *Id.* (citing Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 761-62, 774-75 (1999)). The majority reasoned that an " 'objective observer would perceive [the Dover Amendment] as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.' " *Id.* at 9 (quoting *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 712

(1985) (O'Connor, J., concurring)). The majority concluded:

> The favorable attitude toward religion reflected in the Dover Amendment does not constitute a fostering of, or favoritism toward, religion over non-religion, but represents a secular judgment that religious institutions, by their nature, are compatible with every other type of land use and thus will not detract from the quality of life in any neighborhood

Id.

Chief Judge Torruella flatly rejected the majority's characterization of the statute as an anti-discrimination statute:

> Had the Commonwealth of Massachusetts intended to prohibit discrimination against religion and religious land uses, it easily could have enacted a law saying "No municipality may discriminate against a proposed use of land on the basis of the religious nature of the use or the religious beliefs or affiliation of the user." Such a genuine anti-discrimination law would be plainly permissible under the Establishment Clause. However, Massachusetts has instead prohibited any zoning ordinance that "prohibits, regulates, or restricts" religious uses. The effect of this broader language goes far beyond prohibiting religious intolerance, by exempting religious users from the ordinary zoning process and by granting them a "free pass" with regard to perhaps the most important issue in zoning regulation – location. In my view, either the Dover Amendment responds to a purpose substantially broader than merely preventing religious intolerance or the statute is substantially

> broader than its purpose. Either way, the statute should not receive a "free pass" of its own as if it were merely an anti-discrimination measure.

Id. at 11-12 (Torruella, C.J., dissenting).

Chief Judge Torruella also rejected the notion that the Dover Amendment is the sort of "benevolent neutrality" permitted in *Walz v. Tax Comm'n of City of New York*. *Id.* at 12 (citing *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970). "A 'neutral' statute, in any ordinary sense of that word, would permit (and require) religious uses and religious users to operate on an even playing field with other uses and users, without special hindrances and without special advantage. The Dover Amendment, in contrast, eschews neutrality to place religion in an exalted position, exempt from the ordinary land-use decision making process." *Id.* at 12. The Chief Judge also found unpersuasive the majority's acceptance of the two law review articles' claims that local land use laws impose constitutionally significant burdens on the free exercise of religion.

> Other than outright discrimination, which I heartedly agree could be properly prohibited (by an appropriate anti-discrimination statute), the majority can only suggest vaguely that religious uses might be excluded based on a "general aversion to change in the neighborhood." More telling, however, are the motivations noted by the majority in another section of its opinion – increased traffic and noise, aesthetic considerations, and impact on commercial development. These concerns, of course, are directly related to the compatibility of a particular use or user with the essential nature of the

> existing community. In fact, far from evidencing some kind of religious intolerance (none of which is alleged in this case, by the way), these are precisely the kinds of secular concerns which form the basis for all zoning regulation.

Id. (citations to majority opinion omitted).

The Court of Appeals denied the petition for rehearing and rehearing en banc. Order Denying the Petition for Rehearing En Banc, June 22, 2000. The petitioners now petition this Court to grant certiorari for the purpose of reversing the decision below and declaring the Dover Amendment an impermissible accommodation of religion in violation of the Establishment Clause.

REASONS FOR GRANTING THE WRIT

This case squarely presents an important federal question of pressing national concern that has been percolating in the lower courts for many years and therefore requires this Court's guidance.

I. The Reach of Permissible Accommodation in the Zoning Context Presents an Important Federal Question of Pressing National Concern

This case poses an important federal question of pressing national concern: May a government exempt all religious organizations and individuals from zoning restrictions? Sup. Ct. R. 10. Zoning laws and their relationship to religious entities pose a set of issues that are

of vital importance to thousands of cities, religious organizations, citizens, and neighbors every day, and guidance from this Court on the constitutionality of such laws under the Establishment Clause is sorely needed. While this Court frequently has visited the question of aid to religious entities, and especially school aid, *see, e.g., Mitchell v. Helms*, 120 S. Ct. 2530 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Everson v. Board of Ed. of Ewing Tp.*, 330 U.S. 1 (1947), this Court never has addressed the question of the role of the Establishment Clause in the zoning or land use context, except to uphold the longstanding practice of property tax exemptions in *Walz*. *See Walz*, 397 U.S. at 679-80.

Without question, the instance of invidious discrimination intended to be redressed by the Dover Amendment was unconstitutional and deserving of legislative rebuke and action. In addition to constitutional protections, a law outlawing such discrimination, which distributed the burdens of proof and persuasion fairly, and which allowed damages, injunctive relief, and attorney's fees would have been appropriate under the Establishment Clause. *See, e.g.*, 42 U.S.C. § 1983 (1994) (amended 1996) (allowing causes of action based on constitutional violations and allowing damages, and, upon violation of declaratory decree or unavailability of declaratory relief, injunctive relief); 42 U.S.C. § 1988 (1994) (amended 1996) (allowing attorney's fees to the prevailing party in actions brought under 42 U.S.C. § 1983).

The Massachusetts legislature did not consider such an option, but rather hastily overreacted to the Dover situation. It ensured that the Dover scenario never would

happen again, not by enforcing the right to be free from religious discrimination,[4] but rather by giving religious uses a privilege that would permit them to trump local community zoning laws any time land or buildings were to be used for religious purposes.

The issue squarely presented in this case – whether exemption of religious purposes from zoning laws is an impermissible accommodation of religion – will not go away. Conflicts between land use laws and religious entities long have been with us, but have become more pressing today as rapidly expanding church communities

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[4] The majority opinion relied heavily on two law review articles to reach the conclusion that discrimination against religious entities is sufficiently pervasive to afford all "religious purposes" a free hand in choosing their location in any city, town, or municipality. *See Boyajian*, 212 F.3d at 8 (citing Laycock, *supra*; Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. Davis L. Rev. 725, 729-30 (1999)). The dissent rightly criticized the majority for resting on such claims, *Boyajian*, 212 F.3d at 13 (Torruella, J., dissenting), especially in this case where there is no evidence of any discriminatory intent on the part of petitioners, only a deep concern with the negative secondary effects that arise from a huge building in the midst of single-family residences, whether that building be an office building, a church, or a stadium. *See* Goldberg, *supra*. The only study to date done with any scientific rigor undermines the assertions of the two law review articles on which the Court of Appeals majority rested by concluding that "the activity of religious congregations is hardly constrained under current law and practice." *See* Mark Chaves and William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. Church and State 335, 344 (2000). *See also City of Boerne v. Flores*, 521 U.S. 507, 531 (1997) (noting lack of evidence of religious discrimination).

that are aiming to employ their buildings for multiple purposes throughout the week regularly generate negative secondary effects in residential neighborhoods, in the form of noise, intrusive lighting, traffic congestion, and drainage problems, to name only a few. *See, e.g., Ehlers-Renzi v. Connelly School of The Holy Child, Inc.*, ___ F.3d ___, 2000 U.S. App. LEXIS 19840 (4th Cir. Aug. 14, 2000) (parochial school); *Cohen v. City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994) (daycare centers); *Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2nd Cir. 1990), *cert. denied*, 499 U.S. 905 (1991), *and cert. denied sub nom. Committee to Oppose Sale of St. Bartholomew's Church Inc. v. Rector, Wardens, and Members of Vestry of St. Bartholomew's Church*, 499 U.S. 905 (1991) (landmarking); *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988), *cert. denied sub nom. Forest Hills Early Learning Center, Inc. v. Jackson*, 488 U.S. 1029 (1989), *and cert. denied sub nom. Jackson v. Forest Hills Early Learning Center, Inc.*, 488 U.S. 1029 (1989) (child care centers); *East Bay Asian Local Development Corp. v. State*, 81 Cal. Rptr. 2d 908 (Cal. Ct. App. 1999), *review granted and opinion superceded*, 977 P.2d 692 (Cal. 1999) (historical preservation); *see also* Elsa Brenner, *Harrison Opposition*, N.Y. Times, July 4, 1999, § 14 (Westchester Weekly), at 5 (Mormon temple); David W. Dunlap, *God, Caesar and Zoning*, N.Y. Times, Aug. 27, 2000, § 11 (Real Estate), at 1 (discussing phenomenon of expanded uses of church property); Anne Miller, *Castle Hills Church Feud Heats Up Again; Council Rejects Proposed Settlement*, San Antonio Express-News, June 15, 2000, at 7B (parking lot); *More on the Homeless*, Editorial, Richmond Times-Dispatch, Oct.

18, 1997, at A10 (soup kitchen); Sylvia Moreno, *Neighbors Battling Cathedral School Gym; 'Rich and Powerful' Oppose Big Project*, Wash. Post, June 2, 1999, at B9 (girls' school gym); L. Anne Newell, *'God's Work' Runs Afoul of Zoning Officials; Neighbors Complain, Soup Kitchen Closed*, Arizona Republic, July 26, 1999, at B1 (soup kitchen); Steve Slain, *Unsure of the Unknown: Planned Islamic Prayer Center Worries Some Watauga Residents*, Fort Worth Star-Telegram, Sept. 18, 2000, at 6 (Islamic prayer and community center); Amalie Young, *Oregon City's Zoning Laws Interfere with God's Work, Pastor Charges*, Seattle Times, Feb. 19, 2000, at A9 (Presbyterian church).

As the recent appellate cases addressing these issues should make clear, religious entities have been successful in obtaining exemptions from a wide range of land use regulations, from zoning exemptions of day care centers being run by religious entities, *see, e.g., Cohen*, 8 F.3d at 495, to exemptions from historical preservation laws, Cal. Gov't Code § 25373(d), (e) (West 1999), and, in this case, unilateral power to choose location for any "religious purpose." In addition, the power of religious entities to trump local self-determination in the land use context was supplemented in late July when Congress passed the Religious Land Use and Institutionalized Persons Act, which imposes strict scrutiny on all local government zoning regulations. Religious Land Use and Institutionalized Persons Act of 2000, 106 S. 2869 (July 27, 2000).

This federal constitutional issue of pressing national concern has been percolating in the lower courts for years and requires this Court's attention. *See, e.g., Cohen v. City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993); *Forest Hills Early Learning Center, Inc. v. Grace Baptist Church*, 846 F.2d 260

(4th Cir. 1988). While the recent decisions in these cases have fractured the Courts of Appeals, *see, e.g., Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000); *Ehlers-Renzi v. Connelly School of The Holy Child, Inc.*, ___ F.3d ___, 2000 U.S. App. LEXIS 19840 (4th Cir. Aug. 14, 2000), there is no split between the circuits, and it makes little sense for this Court to await such a split. A split is unlikely to develop in this context, because the lower courts have read this Court's decisions upholding the longstanding practice of property tax exemption, *see Walz*, 397 U.S. at 680, and upholding the religious exemption for religious entities from the anti-discrimination employment laws, *see Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), as *carte blanche* for governments to give churches land use and zoning preferences. *Ehlers-Renzi*, ___ F.3d at ___, 2000 U.S. App. LEXIS 19840, at *27 (exemption for private schools located on premises owned or leased by a religious organization or public entity is constitutional under *Amos* and *Walz*); *Boyajian*, 212 F.3d at 7-8, 10 (total exemption from zoning requirements constitutional under *Amos* and *Walz*); *Cohen*, 8 F.3d at 487, 489-494 (upholding exemption for not-for-profit nursery schools operated in "churches, temples, religious reading rooms, rectories, and parish houses" under *Amos* and *Walz*); *Forest Hills*, 846 F.2d at 261-264 (exemption from licensing requirements for religiously affiliated child care centers upheld under *Amos*).

If the decision in *Boyajian* to uphold a statewide exemption from zoning requirements is permitted to stand without Supreme Court review, especially in light of the Court's denial of certiorari in the *Cohen* and *Forest Hills* cases, the message to states and local government

will be that they have a free hand to benefit religious organizations and individuals in the land use context.

The lower courts' expansive reading of this Court's decisions in *Walz* and *Amos* are deeply at odds with the Establishment Clause's intent to ensure that government does not endorse or underwrite religious practice or belief. *See Mitchell*, 120 S. Ct. at 2556 (O'Connor, J., concurring in the judgment). James Madison drafted the First Amendment's Establishment Clause with the belief that religion and the state would thrive most where the state did not financially support the church: "[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment." Memorial and Remonstrance ¶ 3, *cited in Mitchell*, 120 S. Ct. at 2574 (Souter, J., dissenting). Yet, in this case and others, local and state governments are piling on top of property tax exemption zoning exemptions, in effect permitting religious purposes to dominate how and whether tax proceeds will flow from the uses of land within a particular jurisdiction and whether residential neighborhoods will be livable. The Dover Amendment subjugates community self-determination to the unchecked desires of religious owners and renters, a balance of power that offends the delicate balance between the free exercise of religion and disestablishment principles embodied in the First Amendment.

II. The Dover Amendment Is an Impermissible Accommodation of Religion

At some point – and petitioners would argue that the line decidedly has been crossed with the Dover Amendment – the layering of exemptions for religious entities must amount to a benefit to religious entities that exceeds the scope of permissible accommodation. *See Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 890 (1990); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989). As this Court stated in *Amos*, "accommodation may devolve into 'an unlawful fostering of religion.' " 483 U.S. at 334-35 (quoting *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 145 (1987)). Protecting churches from religious persecution and discrimination is certainly permissible and laudable, but the remedy must be tailored to the substantial burden imposed. *See Texas Monthly*, 489 U.S. at 15. The Dover Amendment goes far beyond lifting the burden imposed by the 1946 Dover law to become a special and unconstitutional benefit for religion.

The Dover Amendment further violates the core principle on which the plurality, the concurrence, and the dissent in this Court's decision in *Mitchell v. Helms* agreed: Laws that aid religion may not define their "recipients by reference to religion." 120 S. Ct. at 2543 (Thomas, J., plurality), at 2560 (O'Connor, J., concurring), at 2580-81 (Souter, J., dissenting). While a law explicitly prohibiting "religious discrimination" would be permissible, because it is carrying out a constitutional mandate, a

sui generis law aiding religion may not be defined by reference to religion.

This Court has permitted governments to support churches through property tax exemptions on the ground that such exemptions have been in place since the framing. *See Walz*, 397 U.S. at 673 ("Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers. The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself.") Zoning laws, however, are a more recent product of the mid-twentieth century, with many arising from the explosion in building that followed World War II and the perceived need by communities and citizens to control sprawl, overdevelopment, and residential environments. *See* Patrick J. Skelley II, Note, *Defending the Frontier (Again): Rural Communities, Leap-Frog Development, and Reverse Exclusionary Zoning*, 16 Va. Envtl. L.J. 273, 277 (1997); James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for Growth Management Statutes*, 18 Harv. Envtl. L. Rev. 489, 494-95 (1994). Zoning exemptions, therefore, cannot be grandfathered into the Constitution by a tradition in place at the time of the framing, but rather need to be examined in light of the Constitution's explicit prohibition on the establishment of religion by government through "sponsorship" or "financial support." *Amos*, 483 U.S. at 337 (quoting *Walz*, 397 U.S. at 668).

The Dover Amendment is a classic instance of the government preferring "religion over irreligion." *City of Boerne*, 521 U.S. at 537 (Stevens, J., concurring); *see also Wallace v. Jaffree*, 472 U.S. 38, 52-55 (1985). A philosophical bookstore would not be able to avoid the zoning laws of Massachusetts communities, but any religious purpose, including a Bible reading, would be eligible. It is undeniable that zoning exemptions, especially when layered on top of property tax exemptions, provide enormous power and privilege to religious individuals and institutions to determine the characteristics of neighborhoods and the use to which property will be put, whether it has been designated by the community as commercial, residential, or some other use.

The Dover Amendment in this case permitted a residential neighborhood ringed with forest to be transformed into a set of low-lying structures at the base of a hill on which a 68,000 square-foot building of formidable proportions presides appended to a parking lot for over 200 cars. It is a building that is intended to attract 100,000 visitors to this neighborhood in the first month alone.

Because the Dover Amendment permits a limited number of "reasonable" regulations to be applied to religious purposes, the neighbors had the capacity to challenge the height of steeples, but little else. *See* Dover Amendment, Mass. Gen. Laws ch. 40A, § 3 (1997); Appendix at 68a, 75a. Neighboring property owners had no capacity to dispute the Church's unilateral decision to locate in this residential neighborhood.

This Court bears the constitutional responsibility to clarify for the lower courts the strictures imposed by the

Establishment Clause in the context of zoning exemptions, and, especially, in the context of the Dover Amendment's capacious grant of power to religious entities to impose their preferences on residential neighborhoods which must suffer such impositions without recourse.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Dated: September 20, 2000

APPENDIX A

UNITED STATES COURT OF APPEALS, FIRST CIRCUIT.

No. 99-1760.

Heard Jan. 3, 2000.
Decided May 2, 2000.

Margaret **BOYAJIAN**, Charles Counselman and Jean Dickinson, Plaintiffs, Appellants,

v.

Thomas GATZUNIS, Building Inspector of the Town of Belmont; John W. Gahan III; as Member of the Zoning Board of Appeals of the Town of Belmont; William D. Chin, as Member of the Zoning Board of Appeals of the Town of Belmont; Thomas P. Callahan, Jr., as Member of the Zoning Board of Appeals of the Town of Belmont; Carlo Tagariello, as Member of the Zoning Board of Appeals of the Town of Belmont; Anthony Leccese, as Member of the Zoning Board of Appeals of the Town of Belmont; James D. Harrington, as Member of the Zoning Board of Appeals of the Town of Belmont; Charles H. Reardon, as Member of the Zoning Board of Appeals of the Town of Belmont; Karl Tobiason, as Member of the Zoning Board of Appeals of the Town of Belmont; Corporation of the Presiding Bishop of the Church of Latter Day Saints; Defendants, Appellees.

Before TORRUELLA, Chief Judge, COFFIN, Senior Circuit Judge, and BOUDIN, Circuit Judge.

COFFIN, Senior Circuit Judge.

This case involves a constitutional challenge under the Establishment Clause of the First Amendment to a

state law and a town ordinance that prohibit municipal authorities from excluding religious uses of property from any zoning area. It is brought by a group of residents of Belmont, Massachusetts, against Belmont officials and the Church of Jesus Christ of Latter-Day Saints, challenging the construction of a large temple on the edge of a residential district in the town. The district court upheld both provisions of law, granting summary judgment for defendants and allowing construction to proceed. We affirm.

I. Background

The essential facts of this case are undisputed and were submitted to the district court with cross-motions for summary judgment. We draw our summary primarily from the district court's opinion, supplementing with details from the decision of the Belmont Zoning Board of Appeals and other pertinent record materials.

Defendant Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints (the "Church" or "LDS") acquired an 8.9-acre parcel of land in the Town of Belmont in 1979. It constructed a meeting house on the property, which is located entirely in a single residential district, and has conducted religious services there since the mid-1980s.

The Church later decided to build a temple on the site. An LDS temple is a large facility, of which there are fewer than 100 worldwide, that is used solely for the Church's most sacred ceremonies. Although Belmont's

zoning by-law permits religious uses as of right in residential districts, see By-law § 3.3, the Church filed an application for a special permit, as required, because it sought to exceed the allowable height limit.

After a series of public hearings in which opponents raised a variety of concerns, the Zoning Board of Appeals in 1997 approved the special permit. The Church voluntarily made numerous design changes in response to neighborhood concerns and obtained unanimous approval of its new design from the Board before it began construction. The final plans call for the temple to occupy some 69,000 square feet and to include one 139-foot-tall spire and several smaller towers.[1] The temple will be set back from abutters by at least 165 feet, and in most locations more than that, although plaintiffs are quick to point out that the setback will consist largely of a parking lot for over two hundred vehicles.

The Belmont by-law allowing religious uses by right in the residential zone where the Church's property is located is in accordance with Mass. Gen. Laws ch. 40A, § 3, known as the "Dover Amendment." That law provides, in part, that a zoning regulation may not restrict the use of land for religious or educational purposes when the property is owned by the Commonwealth, a religious organization, or a nonprofit educational corporation, except that "reasonable regulations" are permitted concerning such characteristics as the bulk and height of structures, open space, and parking.

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[1] The original plan called for six spires exceeding the standard permissible height limitation and a surface area of 94,100 square feet.

Plaintiffs brought this suit challenging both Belmont's by-law and the Dover Amendment, claiming that they violate the Establishment Clause of the First Amendment by favoring religious uses of property without a secular purpose. The district court granted summary judgment for the defendants in May 1999, finding that neither of the laws constitutes an impermissible "establishment" of religion. Plaintiffs then filed this timely appeal.

II. Discussion

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," a proscription that has been extended to the States by virtue of the Fourteenth Amendment. As the Supreme Court long has recognized, "tension inevitably exists between the Free Exercise and the Establishment Clauses," *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973) (citing *Everson v. Board of Educ.*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947) and *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)), and the Court has "struggled to find a neutral course between [them]," *Walz*, 397 U.S. at 668, 90 S.Ct. 1409. While the Free Exercise Clause admonishes the government against impinging on the religious beliefs and expression of its citizens, the Establishment Clause cautions that the government may not adopt the cause of religion as its own. The Seventh Circuit has noted the challenge of reconciling the two Religion Clauses:

> The juxtaposition of the two clauses, and the internal tension they create, makes total separation between religion and government impossible. *Lynch* [*v. Donnelly*, 465 U.S. 668, 673, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984)]; *Lemon* [*v. Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)]. Indeed, "[i]t has never been thought either possible or desirable to enforce a regime of total separation" between religion and government. [*Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973).] Thus the Court has recognized that the First Amendment "affirmatively mandates accommodation," *Lynch*, 465 U.S. at 673, 104 S.Ct. 1355, and "that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm. of Florida*, 480 U.S. 136, 144-45, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987) (footnote omitted).

Cohen v. City of Des Plaines, 8 F.3d 484, 491 (7th Cir.1993); *see Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (quoting *Hobbie*, 480 U.S. at 144-45, 107 S.Ct. 1046); *Zorach v. Clauson*, 343 U.S. 306, 312, 72 S.Ct. 679, 96 L.Ed. 954 (1952) ("The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State."). Our task in navigating the course between the opposing mandates of the Religion Clauses is thus to strike that appropriate balance referred to by the Court as a "benevolent neutrality," *Walz*, 397 U.S. at 669, 90 S.Ct. 1409; *see also Amos*, 483 U.S. at 334, 107 S.Ct. 2862.

As a practical framework for analysis in cases such as this, the Supreme Court has adopted the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), which states that a law does not violate the Establishment Clause if (1) it has a secular legislative purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) the statute does not foster excessive government entanglement with religion. *See, e.g., Amos*, 483 U.S. at 335-39, 107 S.Ct. 2862; *Rojas v. Fitch*, 127 F.3d 184, 187 (1st Cir.1997). The parties generally agree that the third requirement is satisfied in this case, so we will focus, as the parties have done, on the purpose and effects inquiries. Because the state statute (the Dover Amendment) effectively requires municipalities to enact by-laws like that adopted by Belmont, our conclusion that the Dover Amendment is constitutionally permissible largely resolves the lawfulness of the ordinance as well. We therefore discuss the ordinance only briefly in section B, infra.

A. The Dover Amendment

Section 3 of Chapter 40A of the Massachusetts General Laws limits the zoning regulations that can be imposed on certain types of land uses, including agriculture, religious use of property owned by either the Commonwealth or a religious group, nonprofit educational uses, child care facilities, access for physically handicapped persons to private property, solar energy systems, and antennas for federally licensed amateur radio operators. The zoning of religious and educational uses is

addressed in the second paragraph of the section and reads, in pertinent part, as follows:

> No zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

Mass. Gen. Laws ch. 40A, § 3.[2] This provision is commonly known as the Dover Amendment because its religion-focused component was enacted in 1950 in response to a zoning by-law passed by the town of Dover, Massachusetts, prohibiting religious schools within that town's residential neighborhoods. *See Trustees of Tufts College v. City of Medford*, 415 Mass. 753, 757-58, 616 N.E.2d 433,

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[2] Other paragraphs of section 3 detail similar limitations on the zoning of other types of uses. The first paragraph, for example, bars unreasonable regulation of the use of land "for the primary purpose of agriculture, horticulture, floriculture, or viticulture." The third paragraph prohibits local laws limiting the use of land or structures for child care facilities, except for the same types of "reasonable regulations" permissible with respect to religious and educational uses. Also included in section 3 is a provision protecting congregate homes for the disabled from discriminatory health and safety laws or land-use requirements and a prohibition against unreasonable regulation of solar energy systems. *See* Mass. Gen. Laws ch. 40A, § 3.

437-38 (1993); *Attorney General v. Dover*, 327 Mass. 601, 603-04, 100 N.E.2d 1 (1951); *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass.App.Ct. 19, 28, 391 N.E.2d 279, 284 (1979).[3] The protections for other types of uses were added in later years.

Plaintiffs maintain that giving religious organizations the advantage of preferred zoning status constitutes an impermissible endorsement of religion, in violation of the Establishment Clause. Under *Lemon*, our first step in evaluating the Dover Amendment's constitutionality is to ascertain whether it serves a "secular legislative purpose." *See Lemon*, 403 U.S. at 612, 91 S.Ct. 2105.

> This does not mean that the law's purpose must be unrelated to religion – that would amount to a requirement "that the government show a callous indifference to religious groups," *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954 (1952).

Amos, 483 U.S. at 335, 107 S.Ct. 2862. We think the purpose of the Dover Amendment fits easily within the established boundaries of "benevolent neutrality," *see id.* at 334, 107 S.Ct. 2862, in which religious exercise is supported but not promoted.

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[3] In 1950, the Massachusetts Legislature inserted the following language into Mass. Gen. Laws ch. 40, § 25, a predecessor of the current ch. 40A, § 3:

> No by-law or ordinance which prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational educational purpose shall be valid.

There is no dispute that the law was enacted to prevent religious discrimination of the sort embodied in the Dover by-law, which allowed secular educational institutions but barred sectarian ones in the town's residential areas. Indeed, the provision was originally titled "An Act Prohibiting Discriminatory Zoning By-laws and Ordinances." *See Tufts College*, 415 Mass. at 757, 616 N.E.2d at 437-38 (purpose of the Amendment was "to strike a balance between preventing local discrimination against an educational [or religious] use . . . and honoring legitimate municipal concerns that typically find expression in local zoning laws"). Prohibition of religious discrimination is unquestionably an appropriate, secular legislative purpose. *See, e.g., Church of The Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) ("Indeed, it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.' "); cf. *Walz*, 397 U.S. at 673, 90 S.Ct. 1409 (noting, in case challenging property tax exemption for religious uses of property, that "[g]overnments have not always been tolerant of religious activity" and that "[g]rants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes").

Appellants do not dispute the legitimacy of protecting religious entities from discrimination, but they argue that the Dover Amendment goes unconstitutionally beyond such a purpose to endorse and benefit religious uses by removing "any type of real local zoning control of

religious sites" (emphasis in appellants' brief). This argument brings us to the second *Lemon* prong, which examines whether, irrespective of the government's actual purpose, the practice under review has the "principal or primary effect" of endorsing or disapproving religion, *Wallace v. Jaffree*, 472 U.S. 38, 55, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (quoting *Lemon*, 403 U.S. at 612, 91 S.Ct. 2105). Appellants maintain that the statute provides such a substantial advantage to religious institutions that, in effect, it constitutes an advancement of religion in violation of the Establishment Clause.

We note as an initial matter that a law that simply protects religious organizations from unfair treatment certainly cannot be impermissible as an unconstitutional endorsement of religious activity. *See generally Wisconsin v. Yoder*, 406 U.S. 205, 220-21, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (The Establishment Clause "cannot be allowed to prevent any exception" to laws of general applicability which fosters the free exercise of religion.). Yet, it is possible for government to extend itself so far in preventing unfairness that it crosses the line from acceptable accommodation to impermissible favoritism. *See Amos*, 483 U.S. at 334-35, 107 S.Ct. 2862 ("At some point, accommodation may devolve into 'an unlawful fostering of religion. . . . ' ") (quoting *Hobbie*, 480 U.S. at 145, 107 S.Ct. 1046); *Yoder*, 406 U.S. at 220-21, 92 S.Ct. 1526.

Although the precise location of that threshold can be difficult to detect, we are confident that it has not been reached here. Appellants' depiction of the statute as an impermissible legal hammer wielded in favor of religion both grossly exaggerates the reach of the statute and understates the recognition that religion may be given

consistent with the Establishment Clause. As for the statute's scope, it does not exempt religious property uses from substantial standard zoning requirements that are designed to ensure compatible uses of land. As earlier noted, the statute explicitly states in a proviso that limitations imposed on other property owners concerning such specific features as the bulk and height of structures, lot area, setbacks and required parking also may be imposed on religious organizations. *See* ch. 40A, § 3. Thus, a religious institution, no less than any other group, must comply with reasonable regulations designed to preserve a comfortable, desirable community. *See Tufts College*, 415 Mass. at 760, 616 N.E.2d at 439 ("[T]he Dover Amendment is intended to encourage 'a degree of accommodation between the protected use . . . and matters of critical municipal concern. . . . ' ").[4]

As for the statute's assertedly improper focus on religion, plaintiffs err in two respects: the statute does not benefit only religious uses and, even if it did, such unique treatment can withstand constitutional scrutiny.

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[4] We recognize that facially neutral restrictions imposed under the proviso may be subject to challenge as "unreasonable" if they effectively would nullify a religious or other permitted use. *See Trustees of Tufts College v. City of Medford*, 415 Mass. 753, 757-58 & n. 6, 616 N.E.2d 433, 437-38 & n. 6 (1993). The Massachusetts Supreme Judicial Court has stated that the question of reasonableness will depend on the particular facts of each case, *see* 415 Mass. at 759, 616 N.E.2d at 438, with the burden on the institution to "prov[e] that the local requirements are unreasonable as applied to its proposed project," 415 Mass. at 759, 616 N.E.2d at 439.

We look first at the statute's coverage. While the original Dover Amendment was directed solely at religious uses of property, the provision now includes a variety of uses linked together by the legislature's apparent judgment that these uses, though important to all communities, would be at risk of exclusion from certain zoning areas because of local prejudice unrelated to their compatibility with the essential nature of the existing community. Our task is to consider the validity of the statute before us, not the one enacted fifty years ago. *See generally Walz*, 397 U.S. at 688 n. 8, 90 S.Ct. 1409 ("The only governmental purposes germane to the present inquiry . . . are those that now exist.").

It has long been accepted that religious entities may be the beneficiaries of laws that, for secular reasons, provide benefits to a variety of groups. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10-13, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989) (plurality opinion); *Rojas*, 127 F.3d at 188-89. Among the most prominent examples are the exemption from property taxes upheld by the Supreme Court in *Walz*, 397 U.S. at 664, 90 S.Ct. 1409, and the tax deduction for the expenses of religious education allowed in *Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983). In his concurrence in *Walz*, Justice Brennan observed that New York included churches within the exempted class "not because it champions religion per se but because it values religion among a variety of private, nonprofit enterprises that contribute to the diversity of the Nation." *Walz*, 397 U.S. at 693, 90 S.Ct. 1409.

We think an equivalent description applies to the state's judgment here. In protecting religious, educational, agricultural and the other listed uses of property

from exclusion – whether resulting from discrimination or simply from a general aversion to change in the neighborhood – Massachusetts evidences "an affirmative policy that considers these groups as beneficial and stabilizing influences in community life," wherever they are located, *see id.* at 673, 90 S.Ct. 1409. The Supreme Court has time and again made it clear that to include religion in such a category is not to advance religion in contravention of the Establishment Clause. The collection of favored uses in the Dover Amendment is amply diverse in the context of zoning to support such a determination. *See Texas Monthly*, 489 U.S. at 15, 109 S.Ct. 890 ("How expansive the class of exempt organizations or activities must be to withstand constitutional assault depends upon the State's secular aim in granting a tax exemption.").

Turning to our second point regarding the statute's focus on religion, we note that even a special status granted exclusively to religious organizations is not always impermissible. This conclusion is inevitably drawn from our analysis of three of the Supreme Court's more recent Establishment Clause cases. All address benefits that were granted only to religious groups or solely on the basis of religion. One upholds the benefit granted, while the other two invalidate the statutes at issue. Their holdings are instructive, for we see this case as governed by the former and easily distinguishable from the latter.

In *Amos*, the Supreme Court upheld section 702 of the Civil Rights Act of 1964, which exempted religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion. *See* 483 U.S. at 327, 107 S.Ct. 2862. Noting the Court's longstanding recognition that " 'government may (and sometimes

must) accommodate religious practices and that it may do so without violating the Establishment Clause,' " *id.* at 334, 107 S.Ct. 2862 (quoting *Hobbie*, 480 U.S. at 144-45, 107 S.Ct. 1046), the Court endorsed state efforts "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions," *id.* at 335, 107 S.Ct. 2862. The Court declined to invalidate the exemption on the basis that it singled out religious groups for a benefit, stating that where "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Id.* at 338, 107 S.Ct. 2862.

Massachusetts' effort to eliminate local zoning discrimination is fully in line with the Court's approval of government actions aimed at lifting burdens from the exercise of religion. Not only was the Dover Amendment at its origin a defensible response to an actual incident of discrimination, but protections against land use bias continue to be supportable fifty years later. Two recent law review articles canvassing discrimination against religion in the land use context report numerous instances of zoning actions that reflect local sentiments ranging from outright hostility to indifference to the needs of religious organizations, with minority religions particularly hard hit. *See* Douglas Laycock, "State RFRAs [Religious Freedom Restoration Acts] and Land Use Regulation," 32 U.C. Davis L.Rev. 755, 771, 778-80 (1999) [hereinafter "State

RFRAs"][5]; Von G. Keetch & Matthew K. Richards, "The Need for Legislation to Enshrine Free Exercise in the Land Use Context," 32 U.C. Davis L.Rev. 725, 729-30 (1999).

Of particular note is the phenomenon of churches being unwanted either in residential areas – because of increased traffic or noise, or impact on aesthetics – or in business zones – because tax-exempt churches dampen the vibrancy of commercial developments. *See* "State RFRAs," 32 U.C. Davis L.Rev. at 761-62, 774-75; *see also, e.g., Christian Gospel Church v. City & County of San Francisco,* 896 F.2d 1221, 1224 (9th Cir.1990) (upholding denial of permit for church to hold worship services in residential neighborhood, noting that zoning "protects the zones' inhabitants from problems of traffic, noise and litter") (citation omitted); *Cornerstone Bible Church v. City of Hastings,* 948 F.2d 464, 467 (8th Cir.1991) (quoting city council resolution excluding churches from the town's central business district because "no business or retail contribution or activity is generated"). Certainly in the face of such evidence, the state's decision to give religion an assist in the local land-use planning process is consistent with the Supreme Court's holding in *Amos* that legislation isolating religious groups for special treatment is permissible when done for the "proper purpose" of alleviating a burden on the exercise of religion. *See Amos,* 483 U.S. at 337-38, 107 S.Ct. 2862.

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[5] Indeed, Professor Laycock notes that churches are now facing more difficulty in the land use context than in the past. *See* "State RFRAs," 32 U.C. Davis L.Rev. at 764.

Neither of the Court's two other cases, both of which struck down benefits given exclusively for religious reasons, points to a contrary result in this case. In *Estate of Thornton v. Caldor*, 472 U.S. 703, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985), the Court invalidated a Connecticut statute guaranteeing employees the right to take their chosen Sabbath day off from work. The Court noted that the "absolute and unqualified right" given to Sabbath observers required employers to conform their business practices to an employee's religious practices without any "consideration as to whether the employer has made reasonable accommodation proposals," *see id.* at 709-10, 105 S.Ct. 2914, conveying a message of "endorsement of a particular religious belief, to the detriment of those who do not share it," *id.* at 711, 105 S.Ct. 2914 (O'Connor, J., concurring).

As we have observed, the Dover Amendment does not give religious organizations an "absolute and unqualified right" to build whatever structures they desire in residential or other zones. The protection given religious uses is moderated by the community's countervailing interest in minimizing adverse impacts to communities, which is reflected in the requirement that religious uses conform to the standard physical limitations imposed on all buildings located in that zone. Moreover, in a further distinction from the Connecticut statute, the Dover Amendment does not protect one type of religious activity, but "extends . . . to all religious beliefs and practices," *Thornton*, 472 U.S. at 712, 105 S.Ct. 2914 (O'Connor, J., concurring). We think it clear, therefore, that "an objective observer would perceive it as an anti-discrimination

law rather than an endorsement of religion or a particular religious practice." *Id.*

Finally, in *Texas Monthly*, 489 U.S. at 1, 109 S.Ct. 890, five justices in two separate opinions struck down a Texas statute exempting religious periodicals, and no other publications, from state sales tax.[6] In the view of this combined majority of the court, the statute failed for lack of a secular objective. *See id.* at 14-15, 28, 109 S.Ct. 890. In his concurring opinion joined by Justice O'Connor, Justice Blackmun observed that "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable." *Id.* at 28, 109 S.Ct. 890. Here, by contrast, the statute both has an express secular purpose and it embraces a variety of land uses likely to encounter similar local opposition. As such, it does not suffer from the *Texas Monthly* constitutional flaws.

In our view, the favorable attitude toward religion reflected in the Dover Amendment does not constitute a fostering of, or favoritism toward, religion over non-religion, but represents a secular judgment that religious institutions, by their nature, are compatible with every other type of land use and thus will not detract from the quality of life in any neighborhood.

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[6] The statute exempted " '[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith.' " *Texas Monthly*, 489 U.S. at 5, 109 S.Ct. 890.

An impressive body of case law and scholarly texts and articles supports this conclusion. *See Walz*, 397 U.S. at 689, 90 S.Ct. 1409 (Brennan, J., concurring) ("[G]overnment grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities."); *Concerned Citizens of Carderock v. Hubbard*, 84 F.Supp.2d 668, 674-75 (D.Md.2000) ("It is . . . reasonable to presume that 'churches . . . and other places of worship' . . . belong [in the] category of uses [that are] wholly compatible with single family home life." (citing *E.C. Yokley, Zoning Law and Practice* § 35-14, at 35 (4th ed.1980, Supp.1999) (" 'Since the advent of zoning, churches have been held proper in residence districts.' "))); Kenneth H. Young, Anderson's American Law of Zoning § 12.22 at 578 (4th ed. 1996) ("[R]eligious uses contribute to the general welfare of the community, and can contribute most when located in residential districts. . . . ");[7] Terry Rice, "Re-Evaluating the Balance Between Zoning Regulations and Religious and Educational Uses," 8 Pace L.Rev. 1, 3 (1988) (The "dominant status" of churches and schools "is based

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[7] The authors of this treatise note that there are "sound reasons" for excluding churches from residential districts, including the traffic associated with large numbers of people attending services and meetings, *see* § 12.22 at 578. They ultimately conclude, however, that "an ordinance which excludes [religious] uses from residential zones does not further the public health, safety, morals, or general welfare," *id.*, observing: Religious uses serve people best when they are accessible to homes. Religious buildings provide convenient meeting places for youth groups and civic associations. This need can be filled best when the religious institution is convenient to the residents who attend. *Id.*

on a recognition that religious and educational institutions are, by their very nature, beneficial to the public welfare."); *cf. Texas Monthly*, 489 U.S. at 12, 109 S.Ct. 890 (property tax exemption for churches "possessed the legitimate secular purpose and effect of contributing to the community's moral and intellectual diversity").

It is of some note, as well, that proximity to their houses of worship is for some groups a significant component of their religious practice. Orthodox Jews, for example, believe they are prohibited by the Torah, the Jewish Bible, from using automobiles on their Sabbath. They therefore must live within walking distance of a synagogue. *See, e.g., LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 430 (2d Cir.1995); "State RFFAs," 32 U.C. Davis L.Rev. at 779-80. Although we do not suggest that the Free Exercise Clause mandates the Dover Amendment,[8] the fact that the law may serve to avoid a possible barrier to participation in communal worship highlights its effect as an accommodation, rather than a promotion, of religion. *See Wallace v. Jaffree*, 472 U.S. at 83, 105 S.Ct. 2479 (O'Connor, J., concurring) ("[I]n determining whether the statute conveys the message of endorsement of religion . . . courts should assume that the 'objective observer' . . . is acquainted with the Free Exercise Clause and the

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[8] "It is well established . . . that '[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.' " *Amos*, 483 U.S. at 334, 107 S.Ct. 2862 (quoting *Walz*, 397 U.S. at 673, 90 S.Ct. 1409). Some courts, however, have held that it is unconstitutional to exclude churches from residential areas. *See* 2 William W. Bassett, Religious Organizations and the Law § 10:15 (1997).

values it promotes."); *cf. Forest Hills Early Learning Ctr. v. Grace Baptist Church*, 846 F.2d 260, 263 (4th Cir.1988) (exempting religious child care centers from state licensing requirements should be perceived as " 'an accommodation of the exercise of religion rather than as a government endorsement of religion' ") (quoting *Amos*, 483 U.S. at 349, 107 S.Ct. 2862 (O'Connor, J., concurring)).

In sum, the law does not take any of the paths forbidden by the Establishment Clause. It does not endorse an individual religious faith, it does not provide a direct financial subsidy to any religious organization, it does not inject religious activity into a nonreligious context, and it does not "place [the state's] prestige, coercive authority, or resources" behind religious faith in general, *see Texas Monthly*, 489 U.S. at 9, 109 S.Ct. 890, other than to acknowledge its presence and value – as does the Constitution – as "an element of our societal mosaic," *Walz*, 397 U.S. at 693, 90 S.Ct. 1409 (Brennan, J., concurring). The concerns underlying the Establishment Clause arise not when religion is allowed by government to exist or even flourish, but when government sets a religious agenda or becomes actively involved in religious activity. *See Amos*, 483 U.S. at 337, 107 S.Ct. 2862. By protecting religious uses of land among others that are favored by communities generally, but that may encounter particular neighborhood disfavor, the Dover Amendment does not itself advance religion but clears the way so that churches themselves may do so. This is a permissible effect under *Lemon*. *See Amos*, 483 U.S. at 337, 107 S.Ct. 2862. ("A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to

say that the government itself has advanced religion through its own activities and influence." (emphasis in original)).

B. The Belmont By-law

As originally enacted in 1925, section 3 of Belmont's zoning by-law stated:

> In a single residence district,
> (a) No building or structure shall be erected, altered or used for any other purpose than the following, including customary incidental uses:
> (1) Single-family detached dwelling;
> (2) Clubhouse . . . ;
> (3) Lodging or boarding house . . . ;
> (4) Educational or religious use. . . .

The by-law was later amended to reflect the requirements of the Dover Amendment, and the Schedule of Use Regulations that now constitutes § 3.3 permits in all zoning districts "Religious or educational use exempted from prohibition by [the Dover Amendment]."

The Belmont by-law reflects the same benevolent attitude toward religious uses of land that is implicit in the Dover Amendment and, as discussed earlier, we think it a passive preference that is consistent with constitutional principles. Among the by-law's stated purposes are "to encourage water supply, drainage, sewerage, schools, parks, open space and other public requirements " and "to encourage the most appropriate use of land throughout the Town." *See* Belmont Zoning By-law § 1.2 (emphasis added). A legislative judgment that religious activities are suitable in all neighborhoods, whether made

on the state or local level, does not by itself promote the practice of religion. It simply recognizes the widely valued role of religious entities within our communities by guaranteeing them a physical place.

Although the by-law lacks the state statute's explicit anti-discrimination purpose, we do not consider that additional rationale necessary to validate a zoning scheme that gives wide range to religious uses of property among other uses that are similarly important to all communities. Moreover, because the current version of the by-law specifically incorporates the Dover Amendment, we think it fair to view it as implicitly incorporating its anti-discrimination purpose.

In short, the Belmont by-law, like the Dover Amendment, is sufficiently secular in purpose and effect to fall within constitutional boundaries; it recognizes the value of religion without impermissibly promoting its exercise.

III. Conclusion

We therefore conclude that both the state statute and the town by-law pass constitutional scrutiny. Accordingly, we affirm the district court's grant of summary judgment for appellees.

TORRUELLA, Chief Judge (Dissenting).

I am largely in agreement with the majority as to the legal standards which – fuzzy as they may be – apply to this case. However, my application of those standards leads me to a different result than that reached by the majority, and I must respectfully dissent.

My first principal disagreement with the majority is that I do not understand the Dover Amendment to be an anti-discrimination statute. Had the Commonwealth of Massachusetts intended to prohibit discrimination against religion and religious land uses, it easily could have enacted a law saying "No municipality may discriminate against a proposed use of land on the basis of the religious nature of the use or the religious beliefs or affiliation of the user." Such a genuine anti-discrimination law would be plainly permissible under the Establishment Clause. However, Massachusetts has instead prohibited any zoning ordinance that "prohibits, regulates or restricts" religious uses. The effect of this broader language goes far beyond prohibiting religious intolerance, by exempting religious users from the ordinary zoning process and by granting them a "free pass" with regard to perhaps the most important issue in zoning regulation – location.[9] In my view, either the Dover Amendment responds to a purpose substantially broader than merely preventing religious intolerance, or the statute is substantially broader than its purpose. Either way, the statute should not receive a "free pass" of its own as if it were merely an anti-discrimination measure.

Second, the Dover Amendment does not embody the "benevolent neutrality" deigned by the Supreme Court to be the proper balance between the competing mandates

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[9] While the Dover Amendment allows for "reasonable regulation" of certain aspects of physical structures, there can be no dispute that the statute requires that religious uses be permitted on each and every parcel of land in every zoning district in the Commonwealth.

of the Religion Clauses. A "neutral" statute, in any ordinary sense of that word, would permit (and require) religious uses and religious users to operate on an even playing field with other uses and users, without special hindrances and without special advantage. The Dover Amendment, in contrast, eschews neutrality to place religion in an exalted position, exempt from the ordinary land-use decision making process.

The majority justifies this special treatment by holding that, here, religion is just one beneficiary of a law that provides benefits to a variety of groups and that, even if the benefit were restricted just to religion, the Dover Amendment would be justified as an attempt to remove an obstacle to the free exercise of religion. Although I would agree with either justification in principle, neither is applicable here.

The majority is of course correct to recognize that religious entities may be the beneficiaries of laws that, for secular reasons, benefit a variety of groups. *See* Majority Op. at 6 (citing *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), and *Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983)). The lesson that I draw from cases such as *Walz* and *Mueller* is that, when religion is logically a member of some cohesive group to which a benefit is granted for a secular purpose, the Constitution does not demand the strange result of denying an otherwise available benefit to a group solely because of the group's religious nature. However, the uses protected by the various provisions of Chapter 40A, § 3, of the Massachusetts General Laws do not comprise any cohesive scheme comparable to that in *Walz* and *Mueller*. It is hard to imagine what common

secular purpose unites such apparently divergent interests as religious land users, HAM radio operators, and residents who choose to use solar power in their homes. The only common scheme that the majority offers is that "these uses, though important to all communities, would be at risk of exclusion from certain zoning areas because of local prejudice unrelated to their compatibility with the essential nature of the existing community." Majority Op. at 6. Even assuming arguendo that these uses are in fact "important to all communities" and that there is a real "risk of exclusion," I submit that neither the appellees nor the majority have shown that such exclusion would be "unrelated to compatibility with the essential nature of the existing community." Other than outright discrimination, which I heartedly agree could be properly prohibited (by an appropriate anti-discrimination statute), the majority can only suggest vaguely that religious uses might be excluded based on a "general aversion to change in the neighborhood." *See* Majority Op. at 6. More telling, however, are the motivations noted by the majority in another section of its opinion – increased traffic and noise, aesthetic considerations, and impact on commercial development. *See id.* at 7. These concerns, of course, are directly related to the compatibility of a particular use or user with the essential nature of the existing community. In fact, far from evidencing some kind of religious intolerance (none of which is alleged in this case, by the way), these are precisely the kinds of secular concerns which form the basis for all zoning regulation.

The Dover Amendment insulates religion, HAM radio operators, solar energy users, et cetera, from these typical zoning concerns for one simple reason, which the

majority recognizes – the state considers these uses "beneficial." Although the state may generally be free to protect a use or activity solely on the basis that the state likes it, the Establishment Clause prohibits such bare favoritism where the beneficiary is religion.

Nor do I think that the Dover Amendment can be justified as a governmental action aimed at lifting burdens on the free exercise of religion. *See* Maj. Op. at 6-7 (relying on *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987)). The majority states broadly that religious users face local sentiments "ranging from outright hostility to indifference to the needs of religious organizations." Maj. Op. at 8. Apart from religious intolerance, however, (which, again, I fully agree can and should be prohibited by a proper anti-discrimination measure), the majority points only to routine zoning considerations such as concern with traffic, noise, aesthetics, and commercial stimulus as presenting potential "burdens" on the free exercise of religion. It may be true that religious users face these common obstacles in the zoning context, but only to the extent that all land users face them. Frankly, I cannot see that requiring religious users to participate in the ordinary process by which local land-use decisions are made amounts to such a burden on the exercise of religion as to justify a blanket preference like the Dover Amendment. *Cf. Amos*, 483 U.S. at 336, 107 S.Ct. 2862 (finding that uncertain threat of liability imposed a "significant burden" on religious groups). Nor can I agree that the Dover Amendment merely "allows religious groups to advance their own

cause" rather than constituting state promotion of religion. Through the Dover Amendment, Massachusetts has enacted a bare preference for religious uses of land and has placed the entire weight of the Commonwealth behind that preference. "Benevolent neutrality" and appropriate accommodation of religion are laudable and constitutional objectives, but the Dover Amendment simply goes too far, in my opinion. *See Amos*, 483 U.S. at 334-35, 107 S.Ct. 2862 ("At some point, accommodation may devolve into 'an unlawful fostering of religion. . . . ' ").

Furthermore, just as I differ with the majority somewhat in my reading of *Walz*, *Mueller*, and *Amos*, I also have difficulty accepting the majority's distinction of other Supreme Court precedents. Unlike the majority, I find the Supreme Court's decision in *Estate of Thornton v. Caldor*, 472 U.S. 703, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985), quite persuasive here. In the fundamental zoning consideration of location, the Dover Amendment provides religious users with precisely the kind of "absolute and unqualified right" rejected in *Thornton*. *Id.* at 709, 105 S.Ct. 2914. Just as in *Thornton*, the Dover Amendment makes "no exception for special circumstances, . . . no exception when honoring the dictates of [religious users] would cause . . . substantial economic burdens or when . . . compliance would require the imposition of significant burdens on other[s, and] . . . no consideration as to whether the [municipality] has made reasonable accommodation proposals." *Id.* at 709-10, 105 S.Ct. 2914.

Likewise, I read the Supreme Court's fractured decision in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), to support striking the Dover

Amendment. As Justice Brennan stressed on behalf of three justices:

> [W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, . . . it "provides unjustifiable awards of assistance to religious organizations" and cannot but "convey a message of endorsement" to slighted members of the community.

Texas Monthly, 489 U.S. at 15, 109 S.Ct. 890. Justices Blackmun and O'Connor stated that "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about," *id.* at 28, 109 S.Ct. 890 (Blackmun, J., concurring), and I believe the same is true of a statutory preference for religious users in zoning matters.

In summary, I cannot agree with the majority's acceptance of the Dover Amendment as a tolerable accommodation of religion. I would hold that the statute fails both the purpose and effects prongs of the *Lemon* test, and I would declare the Dover Amendment unconstitutional.

I am slightly more troubled by the need to strike down the Belmont bylaw. Unlike the majority, I am not entirely persuaded that the Dover Amendment and the Belmont bylaw must stand or fall together. After all, what troubles me about the Dover Amendment is largely the fact that it removes religious users from the ordinary land-use decision making process and thus places them

in a position of considerable advantage over nonreligious uses and users. The Belmont bylaw would not necessarily raise such concerns, because a local zoning bylaw merely represents the product of precisely that ordinary local decision making process which, if done on a "level playing field," properly determines local land-use issues. However, because the Belmont bylaw is so closely tied to the Dover Amendment, I would find that it is incurably infected with the unconstitutionality of the state statute and must be stricken. I do not suggest, however, that the Establishment Clause would prohibit the Town of Belmont from enacting a bylaw permitting religious uses in any or all of its zoning districts, so long as such bylaw were enacted through the ordinary land-use decision making procedures.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 98-11763-DPW

Decided, May 24, 1999

MARGARET BOYAJIAN, CHARLES COUNSELMAN, AND JEAN DICKINSON, Plaintiffs,

v.

THOMAS GATZUNIS, BUILDING INSPECTOR OF THE TOWN OF BELMONT, JOHN W. GAHAN, III, WILLIAM D. CHIN, THOMAS P. CALLAGHAN, JR., CARLO TAGARIELLO, ANTHONY LECCESE, JAMES D. HARRINGTON, CHARLES REARDON, KARL TOBIASON, AS THEY ARE MEMBERS OF THE ZONING BOARD OF APPEALS OF THE TOWN OF BELMONT, AND CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, Defendants.

1999 U.S. Dist. LEXIS 15610

DOUGLAS P. WOODLOCK:

MEMORANDUM AND ORDER

At issue in this case is whether state and local regulations that prohibit zoning restrictions on the use of property for religious purposes are in violation of the Establishment Clause of the First Amendment to the United States Constitution. I conclude that they present no constitutional violation and accordingly will grant summary judgment against Plaintiffs' claims.

I. BACKGROUND

The facts of this case are undisputed. Defendant Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints (the "Church") acquired an 8.9 acre parcel of land (the "Property") on February 20, 1979, located in the Town of Belmont, Massachusetts. (Joint Statement of Agreed Facts "Joint Facts" PP 1, 10; Joint Facts, Ex. 4.) Plaintiff Margaret Boyajian is an immediate abutter to the Property, and Plaintiffs Charles Counselman and Jean Dickinson are residents of the Town of Belmont (the "Town"). (*Id.* P 1.)

The Property is located within a single residential district. (*Id.* P 10.) Sections 1.3 and 3.3 of Belmont's current by-law, approved on August 6, 1996, generally require property uses within districts to be in conformity with by-law provisions, but exempt "certain aspects of agricultural, educational and religious uses, as provided at Section 3 of Chapter 40A, G.L."[1] (*Id.*, Ex. 3.)

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[1] Originally, the town adopted a zoning by-law on January 19, 1925, amended from time to time, which provided,

> In a single residence district.
>
> (a) No building or structure shall be erected, altered or used for any other purpose than the following, including customary incidental uses:
>
> (1) Single-family detached dwelling;
>
> (2) Clubhouse . . . ;
>
> (3) Lodging or boarding house . . . ;
>
> (4) Educational or religious use;
>
> (5) Farm, garden, nursery or greenhouse;
>
> (6) Municipal recreational use;
>
> . . . . (Joint Facts, Ex. 1 at 153, 155.)

Belmont's by-law is in accordance with Mass. Gen. Laws ch. 40A, § 3 (the "Dover Amendment") which states,

> No zoning ordinance or by-law shall . . . regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.[2]

A church meeting house is currently located on a portion of the Property. (Joint Facts P 11.) On or about

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[2] As originally enacted by the Massachusetts legislature in 1950, the "Dover Amendment" (so-called apparently because it was held to invalidate a zoning by-law enacted by the Town of Dover to restrict sectarian educational uses, *Attorney General v. Dover*, 327 Mass. 601, 100 N.E.2d 1 (1951); see generally *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 28 N.10, 391 N.E.2d 279 (1979)) provided,

> No by-law or ordinance which prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational educational purpose shall be valid.

(Statement of Undisputed Facts ("Undisputed Facts"), Ex. 1.)

In 1975, the Legislature enacted a wholesale revision of the zoning provisions in St. 1975, c. 808, the Zoning Act ("Chapter 808") which is codified at Mass. Gen. Laws ch. 40A. (Joint Facts P 8.) The "Dover Amendment" was essentially reenacted in § 3 of Ch. 40A.

May 28, 1996, in connection with the proposed construction of a Temple to be used for religious purposes on the remaining portion of the Property, the Church filed an application with the town for a special permit to exceed the height limitation allowed under the by-law. (*Id.* P 12.) After a series of public hearings, on March 24, 1997, the Zoning Board of Appeals of the Town of Belmont (the "Board") approved the special permit.[3] (*Id.* P 14.) The Town has issued blasting, sitework, and building permits to the Church, and construction of the Temple is proceeding. (*Id.* PP 15-18).

Plaintiffs have filed a complaint with this court against the Church, the Building Inspector of the Town, and members of the Board, alleging that Section 3.3 of the Zoning By-Law of the Town of Belmont and the Mass. Gen. Laws ch. 40A, § 3, as applied to religious institutions, are in violation of the First Amendment of the United States Constitution (Count I).[4] (2d Am. Compl. at 7.)

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[3] The Church initially proposed a temple of six spires exceeding the height limit, with the temple covering an area of 94,100 square feet. This proposal was approved by the Board. the Church amended its plan in order "to downsize the Temple and thereby to lessen its impact on the neighborhood." The amended plan contains one spire with a height of 139 feet above ground which still exceeds the height limit, and with the temple covering an area of 68,000 spare feet. (Joint Facts, Ex. 4.)

[4] Plaintiffs have agreed to dismiss Count II of their complaint which had alleged violations of the Fifth and Fourteenth Amendments of the United States Constitution. (Pls.' Agreement Dismiss Count II at 1; 2d Am. Compl. at 8-9.)

Before me are cross-motions for summary judgment.

II. STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one which has the "potential to affect the outcome of the suit under applicable law." *Sanchez v. Alvarado*, 101 F.3d 223, 227 (1st Cir. 1996). A genuine issue is "one that must be decided at trial because the evidence, viewed in the light most flattering to the nonmovant, would permit a rational factfinder to resolve the issue in favor of either party." *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990) (citations omitted). Because the parties have filed cross-motions for summary judgment, I "must evaluate each motion separately, being careful to draw inferences against each movant in turn." *El Dia, Inc. v. Colon*, 963 F.2d 488, 492 (1st Cir. 1992).

III. DISCUSSION

The First Amendment provides that, "Congress shall make no law respecting an establishment of religion, or

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Prior to filing this lawsuit, in May 1997, Boyajian and other parties filed a complaint with the Superior Court for Middlesex County, seeking judicial review of the Board's decision. (Joint Facts, Ex. 5.)

prohibiting the free exercise thereof. . . . " U.S. Const. amend. I.

The general principle deducible from the First Amendment and all that has been said by the [Supreme] Court is this:

> that [the Court] will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for . . . benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 669, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970).

"The language of the Religion Clauses of the First Amendment is at best opaque. . . . " *Lemon v. Kurtzman*, 403 U.S. 602, 612, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). In this area, the course of constitutional neutrality "cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz*, 397 U.S. at 669. The Establishment Clause prohibits the government from promoting or affiliating with any religious doctrine or organization. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 590, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989). Although, "no perfect or absolute separation is really possible . . . ", *Walz*, 397 U.S. at 670, courts must prohibit governmental "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* at 668.

Plaintiffs allege that the Dover Amendment and the zoning by-law are in violation of the Establishment Clause because they favor religion over non-religion without any secular purpose. (Pls.' Br. at 3.)

The Amendment and zoning by-law must be analyzed using the trilogy of tests developed by the Supreme Court in *Lemon*. A law is not in violation of the Establishment Clause if it (A) has a secular *purpose;* (B) does not have the principal or primary *effect* of advancing or inhibiting religion; and (C) does not foster excessive government *entanglement* with religion.[5] *Lemon,* 403 U.S. at 612-13.

A. Purpose

"In applying the purpose test, it is appropriate to ask whether government's actual purpose is to endorse or disapprove of religion." *Wallace v. Jaffree,* 472 U.S. 38, 56, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985) (internal quotations and citation omitted). The law must serve a secular legislative purpose in order to be constitutional under the Establishment Clause. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483

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[5] The Supreme Court in *Agostini v. Felton,* 521 U.S. 203, 117 S. Ct. 1997, 2015, 138 L. Ed. 2d 391 (1997) observed that the entanglement prong is "an aspect of the inquiry into a [law's primary or principal] effect." *See also Rojas v. Fitch,* 127 F.3d 184, 187-88 (1st Cir. 1997), *cert. denied,* 524 U.S. 937, 118 S. Ct. 2341, 141 L. Ed. 2d 713 (1998) (discussing Agostini's incorporation of entanglement into effects calculus). I will in this Memorandum focus separately on the entanglement prong rather than conflating the entanglement discussion into the effects discussion.

U.S 327, 335, 97 L. Ed. 2d 273, 107 S. Ct. 2862 (1987). The Supreme Court has explained,

> This does not mean that the law's purpose must be unrelated to religion – that would amount to a requirement that the government show a callous indifference to religious groups. . . . Rather, Lemon's purpose requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.

Id. (internal quotations and citation omitted).

1. Massachusetts Statute: Dover Amendment

The bill which became the "Dover Amendment" was entitled "An Act Prohibiting Discriminatory Zoning By-Laws and Ordinances." (*See* Undisputed Facts, Ex. 1.) The statute addressed zoning regulations of the type passed by the Town of Dover which had prohibited religious denominations from establishing schools in residential districts. *See The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 28 n.10, 391 N.E.2d 279 (1979). The purpose of the Dover Amendment was to place limits on a town's ability to "exercise its preferences as to what kind of . . . religious denomination it will welcome." *Id.* at 33; *see also Needham Pastoral Counseling Ctr., Inc. v. Board of Appeals of Needham*, 29 Mass. App. Ct. 31, 33, 557 N.E.2d 43 (1990), *review denied*, 408 Mass. 1103, 560 N.E.2d 121 (1990); *Southern New England Conference Ass'n v. Town of Burlington*, 21 Mass. App. Ct. 701, 706, 490 N.E.2d 451 (1986), *review denied*, 397 Mass. 1103, 492 N.E.2d 98 (1986) (same proposition).

The statute, which originally provided anti-discrimination protection only for uses of land for religious purposes, has been amended and currently includes protection for a number of nonreligious uses – agriculture, child care facilities, group homes for disabled persons, and solar energy systems – as well. The defendants state that "the statute prevents more than simply religious intolerance . . . Perhaps more often . . . local opposition is [from] abutters and neighbors [who] oppose *any* nonresidential use because they want neighborhoods that are populated exclusively with single-family homes."[6] (Church Br. at 10 (emphasis in original).)

I find that the Dover Amendment has a permissible purpose which passes muster under the Establishment Clause. The statute's evident purpose and the decisions of Massachusetts state courts have demonstrated that the Dover Amendment has a secular purpose of prohibiting discrimination against certain land uses which prevents churches and nonreligious activities from being subjected to discrimination generated by the prejudices of local governments and certain of their constituencies.

The plaintiffs counter by alleging that the Amendment's "clear purpose . . . was to endorse and benefit religious uses." (Pls.' Br. at 6.) To support this contention, Plaintiffs allege that the original statute was confined to religious activities only, demonstrating that religious

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[6] Defendants have described this opposition as the "not in my back yard," or "NIMBY" phenomenon. *See Inspector of Bldgs. of Salem v. Salem State College*, 28 Mass. App. Ct. 92, 98, 546 N.E.2d 388 (1989), *review denied*, 406 Mass. 1103, 548 N.E.2d 887 (1990).

sponsorship was the intent of the Amendment, and that the current group of activities exempted has no rational relationship. Plaintiffs' arguments, however, are without merit.

The Dover Amendment plainly stated that it intended to prevent discrimination against land uses for religious purposes, but nowhere did it state or suggest that it was sponsoring or endorsing land use for religious purposes. *Cf. Wallace*, 472 U.S. at 57-58 (voluntary prayer in school statute ran afoul Establishment Clause where state presented no evidence of any secular purpose and legislative history showed a clear intent to sponsor religion). In the instant case, "there is no reason to believe the [Legislature] meant anything else." *Lemon*, 403 U.S. at 613. In the words of *Lemon*, "[I] find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference." *Id.*

Plaintiffs allege that the Dover Amendment suffers from the same defects as the statute stricken in *Texas Monthly, Inc. v. Bullock*, 489 U.S 1, 103 L. Ed. 2d 1, 109 S. Ct. 890 (1989), because the Amendment originally singled out religious activities for the exemption from zoning bylaws. In Texas Monthly, Texas had originally exempted from its sales and use tax, a broad class of magazines including those focusing on religion. *Id.* at 5. Texas repealed the statute for a three-year period, but continued to exempt only religious magazines during that period. *Id.* The Supreme Court found the statute unconstitutional because the exemption for religious magazines was not based on a valid nonreligious purpose.

By invoking Texas Monthly, plaintiffs place much reliance on the fact that the Dover Amendment had originally provided an exemption only to religious organizations. But, the Supreme Court in Texas Monthly did not hold that laws which single out religion are unconstitutional. The Supreme Court "has never indicated that statutes that give special consideration to religious groups are per se invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause." *Amos*, 483 U.S. at 338 (citations omitted) (upholding federal statute which exempts religious organizations from Title VII's prohibition against discrimination in employment on basis of religion). The Supreme Court in both amos and Texas Monthly stated that laws may provide exemption solely to religious activities under certain conditions. "Where . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Id.*; *see also Texas Monthly*, 489 U.S. at 15. Thus, the fact that the original Dover amendment only included protection for religious activities in not fatal under the Establishment Clause. As stated in Amos, the Massachusetts Legislature had the proper purpose of lifting a regulation that burdened free exercise by religious organizations. Such a purpose was not evident in Texas Monthly.

Moreover, the Dover Amendment currently provides the exemption to a broad class of land uses. The purpose of the current Amendment is plainly to protect certain land uses – such as group homes for the disabled – from potential prejudices of local communities, in a manner

similar to the anti-discrimination protection originally provided only to religious land uses. By contrast, the Supreme Court in Texas Monthly was not persuaded by the fact that Texas had also granted sales tax exemptions for food, agricultural items, and property used in the manufacture of articles for ultimate sale, because these exemptions were provided for purposes completely different from the exemptions provided to the religious magazines. 489 U.S. at 15 n.4.

Finally, Plaintiffs argue that there was no evidence of discrimination against religion in the past. The Supreme Court itself, however, has recognized that discrimination has occurred against religious undertakings. "Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms – economic, political, and sometimes harshly oppressive." *Walz*, 397 U.S. at 673. The Supreme Court has found that "grants of exemption" such as the exemption from certain zoning restrictions in the present case, have been a response to the intolerance and hostility toward religion. *See id.* (upholding tax exemption for churches and other nonprofit organizations).

Where such a secular purpose is determined, the Supreme Court has directed that

> It is not [a court's] responsibility to specify which permissible secular objectives . . . the State should pursue to justify an . . . exemption . . . That charge rests with the . . . Legislature. [This court's] task . . . is rather to ensure that any scheme of exemptions adopted by the legislature does not have the purpose or effect

> of sponsoring certain religious tenets or religious belief in general.

Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 16-17, 103 L. Ed. 2d 1, 109 S. Ct. 890 (1989).

Thus, I find that the Dover Amendment serves a secular legislative purpose which is to prevent local governments from discriminating against uses of land for religious and certain other purposes that have historically generated discriminatory land use regulation.

2. Belmont Zoning By-Law

As with the Dover Amendment, Belmont's zoning bylaw, which has always exempted religious and non-religious land uses, supports a secular purpose. Section 1.2 of the zoning by-law states that its purpose includes,

> to lessen congestion in the streets; to conserve health; to secure safety from fire, flood, panic and other dangers; to provide adequate light and air; to prevent overcrowding of land; to avoid undue concentration of population; to encourage water supply, drainage, sewerage, schools, parks, open space and other public requirements; . . . to encourage the most appropriate use of land throughout the Town, and . . . to fulfill these purposes under the provisions of General Laws, Chapter 40A.

(Joint Facts, Ex. 3.)

As a general proposition, a court "will defer to a municipality's sincere articulation of a secular purpose. This is in keeping with the well settled maxim what courts are 'reluctant to attribute unconstitutional motives

to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute.' " *Cohen v. City of Des Plaines*, 8 F.3d 484, 489 (7th Cir. 1993), *cert. denied*, 512 U.S. 1236, 129 L. Ed. 2d 861, 114 S. Ct. 2741 (1994) (internal citation omitted) (quoting *Mueller v. Allen*, 463 U.S. 388, 394-95, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983)). It is apparent that the zoning by-law not only anticipated the nondiscriminatory purposes of the Dover Amendment but also seeks to incorporate the continuing purposes of the state zoning provisions, Mass. Gen. Laws ch. 40A, as its own.

For essentially the reasons stated in reference to the Dover Amendment, I find that Belmont's zoning by-law is not in violation of the Establishment Clause under this prong of the Lemon test.

B. Effect[7]

In analyzing whether a law has a principal or primary effect that neither advances nor inhibits religion, the Supreme Court has recognized that

> [a] law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence.

Amos, 483 U.S. at 337.

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[7] The Amendment and zoning by-law will be discussed together under the effects and entanglement requirements of the *Lemon* test because there are no material differences under these prongs.

Under this test, I find that the primary or principal effect of both the Amendment and the zoning by-law is not the advancement of religion. Instead, the primary effect of these laws is to reduce discrimination by local governments against entities which use land for religious purposes. Regulations that exempt religious, as well as certain nonreligious land uses from zoning restrictions, hardly place the Legislature and Town in the position of " 'establishing' religion within the meaning of the First Amendment any more than . . . the property tax exemption in *Walz*. . . . " *See Cohen*, 8 F.3d at 491-92 (upholding zoning ordinance allowing nonprofit nurseries operated in churches to be located, by right, in single family residential zones even though for-profit nurseries needed special permits).

Plaintiffs allege that the effect of the Amendment is that it "removes any type of real local zoning control of religious sites." (Pls.' Br. at 5.) The plaintiffs further contend that "the truth is that the Dover Amendment prevents municipalities from imposing any conditions other than those permitted by G.L.c. 40A, § 3." (*Id.* at 14 (emphasis in original).) Both of these contentions lack merit.

The Amendment plainly subjects religious land uses to "reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." *See* Mass. Gen. Laws ch. 40A, § 3, Plaintiffs simply ignore such regulations, presumably because they contradict the suggestion that towns are left unable to impose conditions or limitations – other than use – under the Dover Amendment.

Plaintiffs compare the Dover Amendment to the statute at issue in *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 129 L. Ed. 2d 546, 114 S. Ct. 2481 (1994) by arguing that the accommodation of religion in the Amendment, like that in *Kiryas Joel*, "goes too far." (Pls.' Br. at 15.) *Kiryas Joel* is wholly inapposite, as Plaintiffs', themselves intimate, by characterizing *Kiryas Joel* as "an extreme example of religious favoritism." (*Id.*) In *Kiryas Joel*, the New York Legislature essentially created a school district that followed the lines of a religious community. The Supreme Court found the statute in violation of the Establishment Clause because the Legislature was not neutral in creating the district, but instead created the district in a manner that was "counter to state practice," singling out a particular religious sect for special treatment. *Id.* at 702. The Court found that an impermissible fusion of governmental and religious functions had resulted. *Id.* These factors are absent here and thus, *Kiryas Joel* is not relevant.

C. Entanglement

Under the third *Lemon* test, this court must ensure that the end result of the Amendment and the by-law "is not an excessive government entanglement with religion." *Walz*, 397 U.S. at 674. Such a determination does not mandate "total separation between church and state," *Lemon*, 403 U.S. at 614, but instead, "the test is inescapably one of degree." *Walz*, 397 U.S. at 674.

In order to determine whether the government entanglement with religion is excessive, [courts] must examine the character and purposes of the institutions that are

benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. *Lemon*, 403 U.S. at 615.

It is difficult to conceive how the Amendment or the by-law impermissibly entangles government and church. Even the plaintiffs have not conjured up such an argument. Both the Amendment and the by-law "effectuate[ ] separation between the [government and church] and avoid[ ] intrusive inquiry into religious belief and practice." *See Cohen*, 8 F.3d at 493. By exempting religious land uses from scrutiny by the government and monitoring certain, essentially dimensional, aspects of the uses, the Amendment and by-law "create[ ] only a minimal . . . involvement between church and state and far less than [allowing local governments to decide where religious land uses can be located]." *See Walz*, 397 U.S. at 676. "There is no genuine nexus between [this] exemption and establishment of religion." *Id.* at 675.

Thus, neither the Amendment nor the zoning by-law "create[s] the kind of government surveillance of religious activities or cooperation between government and religious officials that has been deemed an impermissible administrative entanglement under *Lemon*." *Cohen*, 8 F.3d at 494.

D. Alternative Tests

Plaintiffs contend that the statute must meet a strict scrutiny inquiry. (Pls.' Br. at 18-21.) The Supreme Court, however, has made clear that only laws which distinguish among religions are subject to strict scrutiny. *Amos*, 483 U.S. at 339. Laws which provide a "uniform benefit to all

religions should be analyzed under *Lemon.*" *Id.* (internal quotations and citation omitted). *Lemon* is the appropriate test here because neither the Amendment nor the zoning by-law differentiates among religions.

Plaintiffs also argue that because there is no constitutional provision prohibiting exclusion of religious institutions, the Amendment and zoning by-law are unconstitutional. In this, Plaintiffs attempt to find support in cases involving the Free Exercise Clause. Plaintiffs cite to cases – *Grosz v. City of Miami Beach,* 721 F.2d 729, 740 (11th Cir. 1983), *cert. denied,* 469 U.S. 827, 83 L. Ed. 2d 52, 105 S. Ct. 108 (1984) and *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood,* 699 F.2d 303, 309 (6th Cir. 1983), *cert. denied,* 464 U.S. 815, 78 L. Ed. 2d 85, 104 S. Ct. 72 (1983) – which have held that it is not unconstitutional under the Free Exercise Clause to exclude religious institutions from certain zoning districts. These cases, however, are not relevant here. That a law excluding religious institutions from certain zoning areas is found constitutional under the Free Exercise Clause, does not necessitate finding that another law prohibiting exclusion of religious institutions from certain areas is unconstitutional under the Establishment Clause. As the Supreme Court has explained, "It is well established . . . that the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Amos,* 483 U.S at 334 (quoting *Walz,* 397 U.S at 673) (internal quotations omitted.) The Supreme Court in *Walz* further observed that "to equate the two [Clauses] would be to deny a national heritage with roots in the

Revolution itself." *Walz*, 397 U.S. at 673. The Free Exercise Clause cases are not relevant in this context.

IV. CONCLUSION

For the reasons stated more fully above, I GRANT the defendants' motion for summary judgment, and DENY the plaintiffs' motion for summary judgment.

DOUGLAS P. WOODLOCK

UNITED STATES DISTRICT JUDGE

JUDGMENT

WOODLOCK, District Judge

In accordance with this Court's Memorandum and Order issued on May 24, 1999, granting the Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment, it is hereby ORDERED, ADJUDGED AND DECREED:

Judgment for the Defendant against the Plaintiff.

DATED: May 24, 1999

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 99-1760

June 22, 2000

MARGARET BOYAJIAN; CHARLES COUNSELMAN; JEAN DICKINSON,

Plaintiffs, Appellants,

v.

THOMAS GATZUNIS, ET AL.,

Defendants, Appellees.

ORDER OF THE COURT

Before

TORRUELLA, Chief Judge,
COFFIN, Senior Circuit Judge,
SELYA, BOUDIN, STAHL, LYNCH and LIPEZ,
Circuit Judges,

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the petition for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing en banc, be denied.

By the Court:
PHOEBE D. MORSE, Clerk

/s/ JANICE M. O'NEIL
Chief Deputy Clerk

APPENDIX D

TOWN OF BELMONT
BOARD OF APPEALS

Filed Apr. 29, 1997

Case No.:	96-32 97-07
Applicant:	Church of Jesus Christ of Latter-day Saints
Property:	Frontage Road
Dates of Public Hearings:	July 8, 1996 July 22, 1996 August 7, 1996 August 12, 1996 September 18, 1996 October 3, 1996 October 8, 1996 October 23, 1996 December 3, 1996 March 10, 1996 March 13, 1996 March 24, 1996
Members Sitting:	John W. Gahan III William D. Chin Thomas P. Callaghan Jr. Carlo Tagariello Anthony L. Leccese

A TRUE COPY ATTEST:
May 19, 1997 /s/ Catherine T. Stafford
Catherine T. Stafford
Town Clerk of Belmont

On May 28, 1996, the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints

(herein, variously referred to as the "Church", the "LDS Church" or the "Mormon Church") filed an application (the "Original Application") for zoning relief with the Town of Belmont ("Town") Zoning Board of Appeals ("Board") seeking a special permit to construct a religious temple ("Temple") having six uninhabited spires in excess of the applicable height permitted by right under Section 4.2.2 of the Town's Zoning Bylaw (the "Bylaw") and, alternatively, for a determination by the Board of Appeals that the application of the Bylaw height limitation would contravene G.L. c. 40A, Section 3, second paragraph. After public hearings were conducted on the Original Application and after the Board had voted in December 1996 to grant relief to the LDS Church as herein set forth, the LDS Church asked the Board to postpone the issuance of its written decision on the Original Application while the Church considered whether to make further modifications to its plan, to downsize the Temple and thereby to lessen its impact on the neighborhood.

On February 13, 1997, the LDS Church filed amended plans which proposed a Temple containing but one spire, rising to a height of 139 feet above ground and reducing the gross area of the Temple from 94,100 square feet to 68,000 square feet.[1] The amended plans (the "Amended Application") necessitated consideration at a public hearing, which took place on March 10 and March 13, 1997.

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[1] There were a number of other design changes made, all as more fully set forth herein.

Thereafter, on March 24, 1997 the Board voted to approve the Amended Application, with conditions.[2]

This written decision of the Board sets forth the Board's decision relative to the Original Application as well as the decision on the Amended Application. The Board considers that, given the degree of public interest in this case, it is important that the Board's consideration of and reasoning concerning all aspects presented to it, and in particular why the Board granted relief on the Original Application and grants relief on the Amended Application be set forth in detail.

BACKGROUND

The Church seeks to build the Temple on property owned by it located on Frontage Road (the Route 2 access road) in Belmont. The proposed site (the "Property" or "Site") is approximately 8.9 acres and is in an SR-A zoning district, a residential district under the Bylaw. The LDS Church has been the subject of two prior zoning decisions of the Board, both involving the construction of parking facilities for the Church's meetinghouse.[3]

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[2] In approving the Amended Application, the Board's decision is that the LDS Church be allowed to build in accordance with the Amended Application and not in accordance with the Original Application.

[3] The meetinghouse is where the Church has conducted its religious services since the mid 1980's. Temples and meetinghouses are different structures, serve different persons and have different purposes.

THE ORIGINAL APPLICATION - TEMPLE DESIGN WITH SIX STEEPLES

As described in the Original Application, the Temple would have contained six (6) spires. All of these spires would be more than 12 feet above the Temple's building height. This created the need for Board consideration, because the maximum building height allowed by right under the Bylaw is 60 feet (according to the original material submitted to the Board, the Temple height measured in accordance with the Bylaw was slightly more than 58 feet – in the revised plans submitted in September, the building height was shown as 59 feet[4]) and the Bylaw permits, by right, uninhabited projections like steeples or spires to exceed the height of the building by the greater of 10 feet or 20% of the building height.

As described in the Original Application, the spires were designed in two groups of three, one group of three on the east facade and the other group on the west facade. The central spire on the east would be the highest, its last 12 feet of which would be a religious symbol of significance in Mormon theology, the Angel Moroni. The west central spire would be the next highest and the remaining four steeples would be the same height. During the hearing process on the Original Application, the LDS Church downsized the proposal somewhat, reducing the proposed height of the east central spire from 156 feet

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[4] Technically, if the building height were 59 feet, the allowable by right height of an uninhabited projection thereon would be 11.3 feet, not the 12 feet discussed throughout hearings on the Original Application, resulting in the need for relief at the height of 70.8 feet, not the 72 feet discussed throughout such hearings.

to 139 feet and the proposed height of the four lowest spires from 82 to 76 feet. The west central spire remained at 92 feet.

PUBLIC HEARING PROCESS

A public hearing was scheduled for July 8, 1996 in the Belmont High School auditorium. Public proceedings on the Original Application were then conducted in further public meetings on July 22, August 7 and 12, September 18, October 3, 8 and 23. Following the close of public testimony, the record was kept open to allow submission of public written comment until November 1, 1996.

Sitting for the Board and attending all hearings, both on the Original Application and the Amended Application, were Chairman John W. Gahan, III, William D. Chin, Thomas P. Callaghan, Jr., Carlo Tagariello and Anthony Leccese. The Church was represented by its legal counsel, Philip J. Notopolous, Esq., its architect, Richard Kobus and LDS Church Bishop, Grant Bennett. By the time the public hearing process had started, a number of concerned citizens from Belmont and Arlington (the "Neighbors"), many of whom were either abutters to the Property or parties in interest, had formed a group opposed to the Temple proposal. The group (the "Neighbors' Opposition" or the "Opposition") was represented by attorneys Arthur P. Kreiger and Ruth H. Silman of Anderson & Kreiger LLP.

From the outset, the Temple proposal was contested. While the sole area in which the Church proposed something not fully compliant with the Bylaw was in the area

of steeple height, the public record abounds with testimony on subjects such as lighting, blasting, compliance with state codes, Massachusetts Environmental Protection Act, ownership of the Route 2 access road,[5] displacement of animals, shadow studies, traffic analysis, and ecclesiastical architecture.

Ultimately, the only issue to be decided by the Board relative to the Original Application was whether to allow the Church relief to permit the Church to build the Temple with six steeples, the heights of which would exceed 72 feet. Necessary to the Board's consideration were the extent of the Town's reasonable regulation under G.L. c.

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[5] The question of who owns the access road (Frontage Road) abutting the Church property was linked to the question of a curb cut permit. If the Commonwealth owns the fee, the curb cut permit would be issued by the state and the provisions of MEPA might apply.

The material submitted to the Board by the Church suggests that the Town owns the access road. Historically, the Town has disputed that conclusion and the Neighbors raised the issue of ownership at the public hearings.

The Board is not a Land Court and is not empowered to decide issues of ownership or boundary disputes. However, based on the materials in the record of this proceeding, the Board has determined that the Church is entitled to the relief it has applied for and should be permitted to build the temple according to the plans submitted to the Board. Provided the final plans submitted to other Town officials with respect to access to the Property are in accordance with the plans reviewed and approved by the Board and in all other respects in compliance with other municipal regulations, the Board sees no reason that other Town permits, including curb cut permits, shall not be issued. Someone wishing to challenge the Church's right to access its Property in the manner presented to the Board must do so in another forum.

40A, §3, which, as explained below, deals with the application of zoning laws to religious uses, the interplay of G.L. c. 40A, §3 with Section 7.4.2 of the Bylaw which allows the Board to grant special permits for height of projections like steeples, and the extent and exercise of the Board's authority to approve a specific steeple height greater than the Bylaw dimensional norm.

On December 3, 1996, following the submission of detailed memoranda from the LDS Church and the Opposition, the Board conducted its public deliberations. All five members of the Board decided that limiting steeple height to twelve feet above building height (the by-right limit imposed by the Bylaw) would be unreasonable and therefore that the LDS Church was entitled to relief from the Bylaw. However, one member of the Board felt that the specific relief sought in the Church's Original Application was excessive and voted against the specific relief sought in the Church's Original Application was excessive and voted against the specific relief sought in the Original Application. The remaining four members, a sufficient number to grant relief, voted to approve the Original Application with conditions.

What follows sets forth the Board's findings and reasoning with respect to the Original Application. Much of the board's reasoning applies to the Amended Application as well as to the Original Application. The substance of the Amended Application and the Board's vote thereon are set forth at pages 21 through 27.

THE RELIEF REQUESTED

In both the Original and the Amended Applications, the LDS Church has asked for two types of zoning relief: (1) a special permit under Section 4.2.2 of the Bylaw to permit the height of the uninhabited steeples to be in excess of that permitted by right under the Bylaw and (2) a determination that the height restriction in the Bylaw should not be applied to the Temple under G.L. c. 40A, §3. The Church and the Neighbors addressed both issues at the public hearings. For reasons set forth below, the Board feels the seminal issue involves G.L. c. 40A, §3 and that this issue should be addressed first.

HEIGHT REGULATION UNDER THE BYLAW

The height of structures in Belmont is addressed in the *Intensity Regulations and the Schedule of Dimensional Regulations* (Section 4.2) (the "Schedule") contained in the Bylaw. Reference to the Schedule shows that the "Maximum Building Height" varies, both in feet and number of stories, according to the district and is also affected by the ability to set buildings farther back from street and lot lines than the required minimums.

Section 4.2 of the Bylaw provides that, in an SR-A district, building height is limited to 36 feet and 2 1/2 stories. Footnote 5 to the Schedule allows greater building height if a structure is set back from lot and street lines more than ten (10) feet in excess of the Bylaw's setback requirements. However, Footnote 5 of the Schedule also states that, even with greater setbacks, building

height cannot exceed 60 feet or 4 stories.[6] The Church has set its Temple back sufficiently on an unusually large (for the district) lot so as to make 60 feet the allowable building height for its building. Simply put, the Church needs no zoning relief to build to a building height of 60 feet.

Footnote 1 to the Schedule says

> Chimneys, towers and other projections not used for human occupation may exceed the height limitations herein provided that, . . . any such projection above the building height exceeding 10 feet or 20 percent of the building height, whichever is greater, shall be allowed by special permit only.[7]

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[6] Footnote 5 to the Schedule says: "Greater height is permitted provided the building setback from each street and lot line exceeds otherwise applicable requirements by 10 feet plus one foot for each foot of excess height, but in no case shall building height exceed 60 feet."

[7] The 10 feet or 20% limitation is the amount ABOVE THE ACTUAL BUILDING HEIGHT (not above the maximum permissible building height).

Prior to 1982, the Bylaw contained a specific exemption for the height of spires and other projections; there was no 10 feet or 20% provision and there was no regulation whatsoever of the height of steeples. The Board has found no evidence whatsoever that, at the time of the change in the bylaw, there was any public debate about regulating the height of religious structures and in the absence of such, we will not assume a specific intent to regulate steeple height. In fact, since the ward "spires" was included in the specific exemption but not included in the amendment which sought to regulate height of uninhabited projections, one could conclude that there was no desire to regulate the height of spires at all. Debate about the intent of Town Meeting may be interesting; it is not critical to the Board's decision given the Board's findings and conclusions.

The steeples proposed by the Church are towers or other projections not used for human occupation. The Church would need no relief if it limited the height of the steeples to 20% of the building height. With respect to the Original Application, the projection height allowed by right was 12 feet; in the Amended Application, because building height had been reduced to 56 feet, the projection maximum was 11.2 feet.

Height regulations in Belmont are keyed to zoning districts and use.[8] The Bylaw does not mandate an absolute maximum height (building plus uninhabitated projection thereon) which cannot be exceeded.[9]

THE DOVER AMENDMENT

In pertinent part. G.L. c. 40A, §3, second paragraph states:

> No zoning . . . by-law shall . . . prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided,

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[8] Height regulations in Belmont presumably were determined in part by consideration of the allowable uses in a district. For example, heights of buildings in business districts are lower than in residential districts; heights in apartment house districts are higher, reflecting the reality that apartment houses are generally several stories tall.

[9] Even if the Bylaw did establish an absolute maximum, G.L. c. 40A, § 3 would require a determination of the reasonableness of a proposed height.

> however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

The purpose of this statute, especially the "reasonable regulations" language, is to prohibit unreasonable regulation of religion and education while, at the same time, "honoring legitimate municipal concerns that typically find expression in local zoning laws." *Trustees of Tufts College v. Medford*, 415 Mass. 753, 757 (1993). As stated in *Tufts*, the key is to strike a "balance."

Commonly known as the Dover Amendment (and in this decision referred to as the "Dover Amendment" or simply "Dover"), the cited sentence stands for two overarching principles. First, Towns may not prohibit or restrict the use of land or structures for religious or educational purposes. For example, a local bylaw cannot say there shall be no churches or schools in a residential zone. Second, municipalities are empowered to regulate certain specified subjects. Implicit in the itemization of what may be regulated is that other subjects may not be regulated.

Most of the case law interpreting the Dover Amendment focuses on the interplay between absolute zoning requirements and the concept of reasonable regulation. From an analysis of the case law, several points become clear:

1. Facially neutral zoning laws do not automatically survive examination;
2. Reasonable regulations can survive challenge;

3. Questions of reasonableness are fact specific;

4. One challenging the reasonableness of a regulation, facially neutral, bears the burden of proving the unreasonableness;

5. One challenging a regulation should be required to show that the regulation as applied would substantially diminish the religious purpose of a proposal while at the same time not advancing in an appreciable manner the legitimate municipal concerns in regulating a particular subject.

The Church has requested relief pursuant to G.L. c. 40A, §3, seeking a determination that the Bylaw's height limitations are an unreasonable infringement and the Board should not impose the Town's Bylaw limitation on the Church.

UNDER DOVER, THE BOARD MAY DO THE REGULATING

Dover does not say who should regulate or decide "reasonableness"; the statute merely says municipalities may regulate. Regulation in the zoning area is usually done by a zoning bylaw, which establishes a standard, by a building inspector who enforces the bylaw and by a permit granting authority which reviews decisions and/or grant exceptions or relief. The long standing practice in Belmont has led educational and religious institutions to have their proposals, if not fully compliant with the Bylaw, reviewed by the Board of Appeals. Churches and

schools both have come to the Board for relief.[10] Since the Church submitted the matter to the Board, it is proper that the Board decide the issue of reasonableness.[11]

THE DOVER INQUIRY STARTS WITH THE BYLAW

The question of whether a Board should start its inquiry as to reasonableness by looking to its general regulations is a subject of prior court comment.[12] In an

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[10] In Belmont, issues arising under G.L. 40A, § 3 traditionally have been reviewed by the Board of Appeals, as the building inspector, the enforcement officer under the Bylaw, has referred the matters to the Board rather than making the decision as to reasonableness himself.

[11] *Campbell v. City Council of Lynn*, 415 Mass. 772, decided the same day as *Tufts*, addressed the issue of whether the statute "conferred on the Lynn zoning officials discretion not to apply provisions of (the local ordinance) concerning bulk, dimensional and parking requirements that might otherwise pertain." The court concluded that some requirements could not be applied and others "should be reconsidered by the board." Thus, in *Campbell*, the Supreme Judicial Court endorsed the concept that the local board could be the arbiter of "reasonableness" and, in its order of remand, sent the case back to the local zoning board to determine if the building commissioner's decision was correct.

[12] The problem of applying facially neutral regulations to exempt use was one recognized when G.L. c. 40A, § 3 was being amended. Report, 1972 House Doc. No. 5009 stated "The proposed language (on reasonable regulations) would specifically authorize the imposition of reasonable regulations . . . Ideally, this should be accomplished by adopting regulations specifically designed to apply to uses protected by the Dover amendment . . . thus avoiding the problem of attempting to apply the same regulations to the protected uses as ordinarily apply to other permitted uses in the zone. For

early case, decided under the law in effect before the *Dover* proviso was added, the Supreme Judicial Court (the "SJC") stated " . . . it is unlikely that the Legislature would exempt religious institutions from local regulations of use and at the same time (require) that such institutions construct their buildings on dimensions applicable to single family houses." *Sisters of the Holy Cross of Massachusetts v. Brookline*, 347 Mass. 486, 494 (1964). Later, after the proviso was added, a trial court judge quoted in *Campbell v. City Council of Lynn*, 415 Mass. 772 (1993) said to apply general regulations "is permissive at best and suspect at worst." The Appeals Court in *Campbell* had said that a local board has the absolute right to ignore the rules of general applicability. 32 Mass. App. Ct. at 156-157. That statement went too far and the SJC reversed, saying "local officials may not grant blanket exemptions. . . . " *Campbell*, 415 Mass. 772, 778. From the *Tufts* and *Campbell* decisions, it is clear that, although municipalities may establish separate regulations for exempt users, they are not required to do so.[13]

Nonetheless, the Board believes that, as it tries to accomplish the balance cited in *Tufts*, a good place to start is with the local bylaw. A town "may, through the mechanism of its zoning bylaw, consistent with G.L. c. 40A,

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example, instead of attempting to apply residential dimensional regulations to churches or schools located in a residential zone, the bylaw or ordinance should establish dimensional regulations specifically applicable to churches or schools located in such zones."

[13] "We reject the suggestion that only local zoning requirements drafted specifically for application to (religious) uses are reasonable with the Dover amendment." *Tufts*, p. 760.

§3 . . . impose dimensional requirements." *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 30 (1979) (upholding dimensional regulations of the bylaw, while invalidating the requirement that the applicant receive a special permit for its use).

Before an applicant seeking relief under *Dover* can be faced with the burden suggested in *Tufts College v. Medford*, it must be faced with a regulation, a standard, an obstacle where a Church's plans for use of its property run afoul of a local rule. The "rule" in Belmont which is implicated in the case of the Mormon Temple is that all uninhabited appendages on top of a building which extend ten (10) feet or 20% of building height above the actual building height, must go to the Board of Appeals, regardless of the user, regardless of the use or purpose and regardless of the total height achieved. The rule applies equally to chimneys on single family residences and steeples on churches. The Church's desire to have steeples higher than 12 feet above the building height is what brings *Dover* and Section 7.4.2 of the Bylaw into play.

THE APPLICATION OF DOVER

"The reasonableness of a local zoning requirement, as applied to a proposed (religious) use, will depend on the particular facts of each case." *Tufts*, p. 759. So "a local zoning provision . . . may be enforced, so long as the provision is shown to be related to a legitimate municipal

concern, and its application bears a reasonable relationship to the perceived concern."[14] How a municipality chooses to regulate is in some sense a reflection of the degree of local interest in a particular subject.

Building height is a legitimate municipal concern and a proper subject of zoning regulation. The Bylaw reflects that concern by establishing a maximum building height of 60 feet. The Church does not ask to exceed that limit. Footnote 1 of the Schedule suggests some municipal concern with respect to projections above building height but contemplates exceeding of the height and reflects a desire that the board decide what height may be appropriate on a case by case basis under the special permit sections of that Bylaw. The Board questions, however, whether there is any legitimate municipal concern involved in regulating the height of steeples on churches.

The Neighbors have repeatedly framed the question they feel is the appropriate one: is it unreasonable for the LDS Church to adhere to the Bylaw limitation on height? Put differently, does adherence to the Bylaw height limitation unreasonably impact the religious use of the structure by the Church?

Most of the objections have been to the total height, i.e., the building height plus the steeple height. The building height is allowed by right. The Board concludes that the focus must be on steeple height.

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[14] "Facially neutral requirements cannot be applied to (religious) uses without further inquiry into the outcome produced by such an application." *Tufts*, p. 759, n. 6.

IS THERE RELIGIOUS PURPOSE ATTENDANT TO THE STEEPLES?

The first test under the Dover Amendment is whether the land or structure is being used for a religious purpose. Not all uses of land or structures by a religious group have a religious purpose. If there is no use of land or structure for religious purpose, the protection of Dover disappears and, with respect to this proposal, the Church would be, like any other property owner in Town, subject to zoning relief only by special permit granted in accordance with Section 7.4.2 of the Bylaw.

During the hearings the Board asked whether, as part of core Mormon religious principles, an LDS temple must include steeples or spires of a specified height. The answer rather obvious in light of the varied dimensions of LDS temples worldwide, was "No." Thereafter, at every turn, the Opposition hastened to emphasize that the steeples, their number and their height, were not essential to the practice of the LDS religion and thus the specific proposal in Belmont as it related to height was not entitled to protection under Dover. Therefore they7 conclude that limiting the spire height would not nullify the ability of Mormons to practice their religion and hence the limit should be upheld. The law, however, does not view religious purpose quite so narrowly.

Clearly, the specific height of the highest steeple is not a matter of religious principle. This does not, however, mean there is no religious "use" or "purpose" attendant to a steeple. The lack of human occupation in a spire may mean no activity is conducted in the steeple itself; but it cannot be said that no religious use is made thereof.

G.L. c. 40A. § 3. after all, talks of the "use of structures for religious purposes (emphasis supplied)." "Religious purpose . . . means something in aid of a system of faith and worship . . . " "Religious activity . . . involve(s) more than prayer and worship." Needham Pastoral Counseling Center, Inc. v. Board of Appeals of Needham, 29 Mass. App. Ct. 31, 33, 37 (1990).

Mormons believe that the design of a temple is revealed to those in Priesthood administration at a point in time. The specific design of Morman temples varies according to the influence and direction of the Presidency. Revelation from their God to the earthly messengers (the Mormon Priesthood) is a fundamental tenet of the Mormon religion.[15] To be sure, one need not elevate the Mormons' belief in revelation to the level of a direct heavenly message of specific height. But neither may the Board ignore the fact that the Mormons believe that their Priesthood must decide what to build.

Temples, to Mormons, are very different from parish churches, in structure as well as religious purpose, and the function of a Temple is not fulfilled in a Mormon meetinghouse. Temples are rarer than meetinghouses; there are fewer than 100 temples worldwide, contrasted with over 11,000 meetinghouses. Temples are buildings specifically constructed for and limited to the practice of the most sacred of Mormon ceremonies. Temples are built because the Mormons have been instructed to do so.

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[15] *The House of the Lord*, p. 92, by James E. Talmage, published by Deseret Book Company, Salt Lake City, Utah, 1969.

It is clearly part of Mormon theology to reflect, in their buildings, the belief of an ascension towards heaven. In Mormon faith, temples are built vertically, with ascending levels bringing the faithful practitioners closer to their God. Baptism, in traditional Christian religions a rite of originating belief, occurs on a lower level. The Celestial Room, representing heaven, is on the highest level. In the Amended Application, the assembly Room which in the Original Application had been on the same level as the Celestial Room has been moved below grade; the Celestial Room remains the highest inhabited area of the temple.

Steeples and spires point towards heaven; they raise our eyes upward and, in most religions, looking upward is looking towards God. Even if not all Belmontians believe this, the important point is that members of the Latter-day Saints Church do.

The spires serve the purpose of lifting Mormons' eyes and thoughts towards heaven. In the Mormon faith, the Angel Moroni, a heraldic figure whose likeness would be atop the highest spire calls upon Mormon practitioners to listen to the Gospel.[16] The Angel situated between the heavens and the ground, where worshippers gather, reminds Mormons that, as they look upward toward their God, there will be a succession of God's clarions calling

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[16] "The restoration of the Gospel is symbolized by the Angel Moroni set atop the spire of the center tower of the cast facade." The Salt Lake Temple, A Monument To A People, published by Deseret Book Company, Salt Lake City, p. 144. Appendix B submitted to the Board by the Applicant on November 15, 1996.

them forward. The Angel is one. The six spires represent the LDS Priesthoods, who are the human messengers of God. The spires are emblematic of the Priesthood's authority on earth.

Temple building reflects a then current Priesthood's thinking as to how best to incorporate the principles of their faith in a building to honor their God. With regard to the six steeple Temple presented in the Original Application, it was Brigham Young who said that there should be six spires and further described their east/west orientation and relative height.

The law suggests that there needs to be "a degree of accommodation between the protected uses . . . and matters of *critical* municipal concern . . . " *Trustees of Tufts*, 33 Mass. App. Ct. 580 (1992) (cited with approval in *Tufts*, 415 Mass. 753 (emphasis supplied)). However, the Board finds no critical municipal concern with steeple height.[17] It is hardly accommodating to a protected use to limit the Church to a 12 foot projection.

In the Board's judgment, steeples serve a religious purpose, whether or not specific activities associated with

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[17] Until 1982, the Bylaw exempted spires (and other projections) from the height limitations affixed to buildings. When the Bylaw changed, there is no recorded indication that the change resulted from a municipal concern with steeple height. Indeed, the fact that the ward "spire" was eliminated in 1982 from the list of projections limited to 10 feet suggests, if anything, that Town Meeting intended spires to be treated differently from other projections. If the reason the Bylaw was changed was in response to a new perceived municipal concern with steeple height, it is quite doubtful that the word "spire" would have been dropped from the text.

religion are practiced therein. While the "use" may be more symbolic than functional the symbolism is nonetheless real and, in the Board's view, worthy of consideration as part of a religion.[18]

That LDS temples exist without spires does not mean the spires are superfluous or devoid of religious meaning. Nor can the Board ignore the religious symbolism of spires just because temples exist without them. Can the Mormon religion be practiced in a temple with fewer than six spires, with steeple heights of less than 140 feet? Yes. But that is not the question.

The Board finds that Steeples and spires, and the religious symbols that adorn many of them, have religious purpose, whether or not specific activities associated with religion are practiced therein. That purpose may be more symbolic than functional but symbolism is part of religion and therefore worthy of protection. Therefore, the Board concludes that there is religious significance and purpose in the design of the Temple and that the specific design selected for Belmont is consistent

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[18] The symbolism attendant to high projections is not limited to churches, Daniel Webster once said of the Bunker Hill Monument,

> "We wish that this column rising towards heaven among the pointed spires of so many temples dedicated to God, may contribute also to produce in all minds a pious feeling of dependence and gratitude. We wish finally that the last object to the sight of him who leaves his native shore and the first to gladden his who revisits it, may be something which shall remind him of the liberty and the glory of his country."

with Mormon tradition and theology. This finding applies equally to the Original Application as well as to the Amended Application.

HEIGHT AND THE EFFECTS OF HEIGHT

Height is a matter of allowable, reasonable regulation under *Dover*. Height is also a subject regulated by the town's Bylaw, thereby evidencing a municipal concern relative to the consequences of unrestrained height. Finally, the height of uninhabited projections above a building is a matter regulated by special permit in Belmont, evidencing a perceived need to control on a case by case basis but not necessarily to prohibit on an absolute basis.

As one matter of municipal concern, boards should be concerned with safety. Cited throughout the hearing process as a safety concern was the question of whether fire fighting equipment could reach the height of the proposed steeple. No ladder in Belmont could, but the area of the temple above 60 feet is uninhabited so there would not be a life safety issue. The Town's Fire Department confirmed that all habitable portions of the Temple are accessible to life safety equipment. Questions were also raised as to the effect of the Temple's height on air traffic in the vicinity of the Temple. The Church submitted, and the Board accepts, a letter from the Federal Aviation Administration that even at a height of 156 feet (the original highest point of the spire) there was no hazard to air navigation nor was there any need for warning lights.

Height also relates to visibility and to a lesser extent aesthetics. The greater the height, the greater the visibility. At night time, it is the lighting imposed by the Church itself and other ambient light (cars passing on Route 2, moonlight, etc.) which makes the Temple and particularly its spire(s), visible. Churches should be visible and the identification of a structure as a church resulting from the adornment of the structure with a cross or an angel is part of the religious belief which the Board finds has religious purpose, protected under Dover.

The principle objections by the Neighbors with regard to the steeples were visual consequences; lighting and shadow effects. Much information was presented on the visual consequences of the Temple and the steeples, ranging from shadow studies to detailed analysis of lighting. The by-right building has visual consequences, many of which Neighbors object to, and which could only be "ameliorated" by the Church not building what it has an absolute right to build, a massive sixty foot edifice atop a hill with additional projections of some height. It is not the spires, but the building, which is the root of most of the Neighbors' objections, but it is the height of the spires not the building which is the only subject of the Board's jurisdiction.

Lighting on the Temple will comply with Town standards and the board cannot and will not require more of this church than it requires of other churches in Town. All nonsecurity lights will be turned off at 11:00 p.m., just like other Belmont churches. Other churches are lighted after dark, including ones in residential zones and including ones which tower over their very close residential neighbors. This church will be treated no differently. The

Church is more than 300 feet from its closest residential neighbor. Spillover lighting is not an issue – there will be none or, if there is, the Bylaw limitation will be enforced. As to surface brightness, the Church has said it will be "like other Belmont churches."

A public safety issue was raised as to "black ice" on Route 2 by those who speculated that shadows cast by the Church would promote more black ice on the hills of Route 2 and lead to more accidents. The Board finds such argument purely speculative and not supported by credible evidence of a scientific nature.

STEEPLE HEIGHT

The Board was presented with much detail comparing the height, mass and lighting of the proposed Temple to those of other religious structures, both in Belmont and surrounding communities. Certain comparisons made by the parties at the hearings were irrelevant. For example, both parties focused on the LDS Temple in Washington, D.C. It is taller than the proposed Temple by more than 100 feet, it is lighted at night, it has a visitor's center, it attracts tourists – it is exactly what the Neighbors' Opposition do not want to see on Belmont Hill. On the other hand, the Washington temple is much more visible from the highway than it is from abutters' properties. There has been no discernible drop in property values in the area around that temple and the traffic (much more than is predicted for Belmont) does not create gridlock in the abutting residential neighborhoods. But Washington D.C. is not Belmont and the Church did not ask to replicate that temple and place it on Belmont Hill.

There was also a plethora of information submitted, again by both sides, as to other Morman temples built in the United States. LDS temples exist with no spires; many have but a single spire. Temples built in the last twenty-five years have had steeple height ranging from 90 feet to nearly 300 feet, according to information supplied by the church. Ten temples have been built in the United States since 1983. The temple in San Diego has ten spires and is in a commercial district. Five temples have six spires, with average steeple height (we assume of the tallest steeple) of 120 feet, ranging from 95 feet to 169 feet. Four temples have one spire, ranging from 90 feet to 176 feet and averaging 130± feet.

The parties also compared the Temple to other churches in Belmont and in the surrounding area. The Mormons focused attention on churches built a long time age which have building height and spire height in excess of those proposed by the LDS. The Opposition focused attention on the mass of the proposed Temple and on the fact that, in their view, the Temple would be out of scale with its surroundings.

While comparisons are often misleading, the Board did find two comparisons helpful: steeple height relative to occupied building height or "proportionality" and distance from abutters. In Belmont (as well as in many surrounding communities), the heights of spires on churches relative to the height of the occupied building were in a broad range but it was not uncommon to find ratios of 1:1. in other words, the height of the spire is the same as the height of the building, thereby doubling the total height of the structure measured from the ground to its highest point. It is not unusual nor in the Board's

judgment unreasonable, for spire height to in effect doubles the total height of the structure. This is true of some Belmont churches which (a) abut residential property and (b) have ground elevation higher than their residential neighbors. These other Belmont churches generally are not considered out of place, and the proportionality of their steeple height to building height appears proper. The conclusion drawn by the Board is that proportionality of building height and steeple height should be a factor to consider when deciding what is a reasonable height regulation. With respect to proportionality, other Belmont churches have steeple height greater than building height, and at least one has a steeple height 1.5 times the building height. While this is not the case with all Belmont churches, it does suggest to the Board that architectural considerations when combined with the religious purpose served by Church steeples, could support a steeple height in the range of 60 to 90 feet above the top of the building.

How "big" something is often relates to perspective: how it relates to other items near it or how far away it is. The proposed Temple structure is large when compared to other nearby buildings but is made less imposing by its relative distance from abutters. Most churches in Belmont like most buildings in Belmont sit on small lots close to neighbors. The proposed Temple sits on a nine-acre site and is set back from its neighbors' property by considerably more land than are most buildings in Town. The Bylaw recognizes the relationship of height and distance in allowing greater building height to be achieved through greater setbacks. The conclusion reached by the Board is that because the spire will be set back so far from

abutting property (over a football field away from the nearest residential property), greater steeple height is more reasonable.

A LIMITATION OF STEEPLE HEIGHT TO 12 FEET IS UNREASONABLE

The Bylaw "limitation" would affect all spires of more than 12 feet (and some spires of less than that) because the Bylaw requires a special permit for projections of greater than 20% of building height (60 feet is the maximum building height) or ten feet. Therefore, any proposed steeple on any church which steeple is 12 feet one inch or higher would run afoul of the Bylaw and in the absence of Dover, would require a special permit. Imposing a twelve foot steeple height on a 60 foot church, or a ten foot limit on a 36 foot high church, seems unreasonable to this Board among other reasons because it ignores the concept of proportionality.

Unanimously, the Board concluded in the Original Application that requiring the Temple to be constructed with spires no higher than 12 feet was unreasonable. Similarly, when considering the Amended Application the Board unanimously concluded that adherence to a 11.2 foot height on the single spire was also unreasonable.

While it is relatively easy to determine that applying a 12-foot limit to a church steeple is unreasonable, it is more difficult to determine where to go from there. Once the Bylaw's facially neutral "limit" is found to be unreasonable as applied to churches, does that mean (a) there is no limit, that the authority of a municipality to regulate

disappears totally or (b) the proposal advanced by a church must be accepted without modification or at least must be accepted unless the Board finds it unreasonable?

The Board eschews the conclusion that it has no authority to establish a reasonable height limitation. If a municipality had no zoning regulation which applied to steeple height (and for many years Belmont had no regulation of spire height), the Dover Amendment still allows regulation of height. That specific authority to regulate reasonably should not disappear just because the Board finds that adherence to a limitation designed for residences should not apply to churches.

In deciding on the Original Application the Board determined it should not be the developer of property in the Town. This is especially so when the use is one protected by statute. Even in the arena of dimensional (as opposed to use) regulation, if there is an issue of religious purpose involved the Board should exercise caution in deciding what is best for the Church especially if what is being debated is architectural features or aesthetics.

An example of this is the Board's action on the Original Application. The church requested relief to have six spires each exceeding the height limitation. The Church builds temples with one spire; the Church builds temples with six spires. While many might prefer that the number of spires, at whatever height, be limited to one, the Board declined to say six spires is inappropriate in light of the teachings of the Church. The use of six spires is supported by Mormon theology, serves a religious purpose and is therefore protected.

When the Amended Application was submitted, some sought to read into the redesign proof that, ipso facto, there had not been religious purpose in the six steeple design (because if there had been, the six steeple design would not have been abandoned) and that the single spire design still failed to show religious purpose associated with the specific height presented. The Board disagrees. The purpose attendant to spires is served by Temples with six spires and Temples with but one spire.

To reiterate, the Board easily concludes that a spire on a church serves a religious purpose and that purpose is unreasonably limited if the height cannot exceed 10-12 feet.

Less clear is how the Board should regulate. The Board has considered all of the information submitted to it comparing the proposed temple to other temples, to other religious structures and to other Belmont structures. It has also considered that many of the evils associated with the Temple by the Neighbors have to do with use of the Temple (e.g. a visitor's center, traffic, types of functions, noise), the construction activities which are attendant to a by-right building (e.g. blasting, dust pollution, animal displacement) or the mass of a by-right building.

The issue is not whether a different height than that which is proposed could be found to be reasonable. In the Board's view, the proper process to follow is one which says that once the Bylaw limitation designed for residences is found to be an unreasonable limitation on a church, the board should next determine whether the proposal advanced by the Church is reasonable.

SPECIAL PERMITS UNDER THE BYLAW

Section 7.4.2 is the Bylaw's special permit section.[19] Under Footnote 1 to the Schedule in Section 4.2.2, special permits may be granted, which allow the exceeding of the limitation on steeple height. Section 7.4.2 provides, in applicable part, as follows:

> Special Permits shall be granted only if the . . . [Board] determines that the proposal's benefits to the Town will outweigh any adverse effects for the Town or the vicinity, after consideration of the following preferred qualities among other things:
>
> . . .
>
> c) Visual Consequences:
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> 1) Views from public ways and developed properties should be considerately treated in the site arrangement and building design.
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> . . .
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> 3) Departure from the architectural scale of buildings on abutting and nearby premises should be minimized, except where the departure would serve some townscape purpose.

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[19] G.L. c. 40A treats variances very differently from special permits. Variances, covered by G.L. c. 40A. § 10, require a showing of hardship on the part of the applicant. Special permits are covered by Gen. Laws, c. 40A. § 9 and are controlled by a different legal standard. Special permit relief often involves use and dimensional review by the permitting granting authority and establishing conditions on which relief is appropriate. To the extent the LDS Church proposal needs relief beyond that available under the Dover Amendment, the Church needs a special permit, not a variance.

. . .

e) Process.

1) Where possible, the proposal should have been developed in consultation with those likely to be substantially impacted by it.

2) Mitigation or, where that is inadequate, offsetting compensatory actions, should be used to ameliorate negative consequences for other parties or the Town.

Section 7.4.2 directs the Board to analyze a proposal according to a test of benefits and burdens. The Board is to conduct the analysis after consideration of a number of "preferred qualities." Section 7.4.2 does not limit the Board's consideration to only the preferred qualities. It says "among other things." In its deliberations, among the other things the Board felt were important were consideration of the purpose of G.L. c. 40A. § 3 (limiting the authority of municipalities to restrict religious use of property) and the deference the Board felt should be given to religious institutions in their use of architecture for religious purposes. This deference has been considered by the Board and is reasonable in light of the values expressed by the Dover Amendment.

THE GRANTING OF SPECIAL PERMITS IS NOT INCONSISTENT WITH TOWN MEETING'S WILL

Many opponents of the LDS proposal argued vigorously in favor of their "right" to have by Bylaw provisions strictly enforced by the Board. They suggested that, in the establishing of dimensional regulations. Town Meeting desired to establish an immutable limit which

could not be exceeded and that the Board was ignoring Town Meeting's will and their rights if the board allowed any relief. This argument reflects a misunderstanding of the special permit process and the rule of the Board in enforcing or granting relief from the Bylaw.

While Town Meeting establishes the norms, both the Bylaw and the General Laws provide for variances and special permits to be granted by the permit granting authority (in Belmont, the Board) in cases where an applicant seeks to do something prohibited on its face by the Bylaw. If, as some of the Opposition alleges, the will of the Town Meeting must be followed as expressed in the dimensional tables, there would be no need for a special permit granting authority and no need for Town Meeting to say that the Board can grant relief in steeple height.[20]

In any event, the Board is not willing, without specific evidence of specific intent on the subject, to infer that Town Meeting intended its dimensional guidelines set forth in the Schedule to be the specific limits of "reasonable regulation" which Dover permits. More to the point, as to steeple height. Town Meeting did not set an absolute limit for anyone. By allowing for special permit relief, in the Board's view, Town Meeting implicitly acknowledged

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[20] The fact that the Bylaw allows a particular use only upon issuance of a special permit does not indicate a desire to prohibit such a use. In Belmont, special permits are required in all cases where a property owner wants to operate a restaurant or a family day care home not because Town Meeting wants to bar restaurants or day care centers, but rather because Town Meeting has decided such uses ought to be reviewed and regulated.

that the subject of the height of projections atop a building needs to be reviewed, regulated and possibly conditioned on an application-by-application basis.

It does not make sense to suggest that allowing a height above the Bylaw threshold for needing a special permit creates a bad precedent. The Bylaw already provides every property owner, not just churches, with the right to seek a special permit. The Board already has the authority, case by case, to allow dimensional relief. Finally, the Board has already granted relief under the Bylaw and under Dover to the Holy Cross Armenian Church for steeple height and to the Building Committee for the Chenery Middle School in several areas controlled by the Dover Amendment.

DOES THE LDS CHURCH NEED SPECIAL PERMIT RELIEF?

A question exists as to whether the Church even needs special permit relief. Because the Dover Amendment would require examination of steeple height anyway, arguably all the relief the Church needs is available to it without regard to the Town's special permit language.

There have been a number of cases decided by Massachusetts courts under the Dover Amendment. A common thread has been that municipalities cannot condition relief to exempt institutions on the obtaining of a special

permit or a variance.[21] If one accepts that tenet, then it is not illogical to ask whether a municipality can insist upon satisfaction of special permit criteria or variance standards as part of reasonable regulation of the exempt user. Cases suggest that employment of the process used in site plan reviews or special permits may not be used to achieve an end run around the protection the statute affords and should not be countenanced because the amount of discretion that a permit granting authority can exercise when it invokes special permit criteria could "enable the board to exercise its preferences as to what kind of . . . religious denominations it will welcome, the very kind of restrictive attitude which the Dover Amendment was intended to foreclose."[22]

Just because the Bylaw provides a mechanism for the granting of special permit height relief to every property owner does not mean the Church can obtain relief only under that section. Were there no provision for a special permit in the Bylaw, the Church would still be able to

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[21] "A local zoning law that improperly restricts (a religious) use by invalid means, such as by special permit process, may be challenged as invalid in all circumstances." *Tufts*, p. 765.

[22] "The Legislature did not intend to impose special permit requirements, designed under G.L. c. 40A § 9, to accommodate uses not permitted as of right . . . , on legitimate (religious) uses which have been expressly authorized to exist as of right in any zone." *The Bible Speaks v. Board of Appeals of Lenox*, 8 Mass. App. Ct. 19, 33 (1979). While the cases have dealt with use permits, the principle that zoning relief cannot be conditioned on the issuance of a special permit (which, by implication, subsumes the need to satisfy special permit provisions of a local bylaw) may be equally valid when applied to dimensional regulation.

seek relief under Dover and if the Church successfully presented its case that the dimensional limitation set forth in the Bylaw as applied to the religious use was unreasonable, relief would be granted. A special permit is not the sole vehicle for relief.

The Legislature did not ordain that the "reasonable regulation" by the municipality allowed under G.L. c. 40A, § 3 must be a matter of a special permit inquiry or determination. If that were the intent, the Dover proviso might say "provided the special permit granting authority may grant special permits from requirements with respect to. . . . "[23]

In sum, therefore, while a special permit is not required for a church to obtain relief from a bylaw provision, special permit considerations may be appropriate in determining reasonable regulations under Dover. These considerations come into play only after the Board determines, as the Board has done here, that the bylaw limitation is unreasonable when applied to the Church and that relief is therefore necessary.

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[23] It should also be noted that, in another section of G.L. c. 40A, where municipalities are prohibited from barring particular uses, the law is clear that the allowable regulation is by special permit. See G.L. c. 40A, § 9. While it may not be correct to read too much into a comparison of the various sections of c. 40A, it is not unfair to emphasize that exempt users need not rely on variances or special permits as their only source of relief.

SPECIAL PERMIT CONSIDERATIONS[24]

Once the Board has determined that the limitation on the height of the steeples specified by the Bylaw is unreasonable, it makes sense for the Board to consider the height requested by the Church in the context of the applicable special permit considerations. Among other reasons, this is so because the Bylaw allows any property owner to seek special permit relief from the height of projections.

Among the preferred qualities to be considered by the Board in reviewing special permit applications is whether an application has been made in consultation with those expected to be most affected. The Church certainly made efforts to satisfy this consideration. Before the application was filed, the Church visited neighbors and presented its plans. During the public hearing process, negotiations took place between the Church and the

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[24] At the outset of the hearings, the question was raised whether an inquiry under Section 7.4.2 should be directed at the Temple proposal as a whole or whether the inquiry should be narrower, looking only to that part of the Temple proposal, steeple height, which implicated the special permit process. Both sides ultimately focused on steeple height. The Neighbors felt there were no benefits to the Town attendant to the proposed steeples, other than possible aesthetic considerations, which were tenuous grounds for relief. While the Neighbors might concede that there were some benefits to the "conditions" offered by the Church, those conditions, save one, did not relate to the steeples. Citing visual impairments, the issue of lighting on the Church and the possibility of adverse effects caused by shadows cast by the proposed Temple, the Opposition felt the benefit vs. burden test favored their position and that the relief sought by the Church should be denied.

Opposition. After several nights of hearings, and after the public had availed itself of the opportunity to ask questions and express concerns about the specifics of the proposal, the Church "downsized" the height of the steeples.[25]

The conduct of the Church during the hearings satisfied the Board that the "process" encouraged in the Bylaw, of developing plans after consideration of the views of those affected and offering mitigation or offsetting benefits, was followed. Information on matters not subject to regulation by the Board under Dover or indeed under any regulation was proffered by the Church.

The presentation of voluntary restrictions or conditions which the Church would allow to be imposed on its use also reflects the Church's adherence to process considerations. Many of the items offered represent self-regulation. Many extend the territorial dictates of the other Bylaw subjects (like parking lot setbacks) or of state regulations (e.g., blasting mitigation measures). Others, like extensive landscaping, benefit both the Church and the Neighbors. The agreement to abandon an existing easement onto Crestview Road seeks to ensure that all

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[25] Height was reduced from 156 feet to 139 feet (a 10.9% reduction in total height and a 17.7% reduction in steeple height) on the east central spire. The reduction in the amount by which the reduced spire would exceed the by right height is 20%. The four lowest steeples were reduced from a height including building and steeple of 82 feet to 76 feet (7.32%) with steeple height reduced from 22 feet to 16 feet (27.3%). The reductions in height, accompanied by reductions in mass, were done with an eye towards reducing adverse affects perceived by the Neighbors.

traffic to the Temple will be routed to the access road, rather than through the residential neighborhood. Other specific concerns expressed by the public (e.g., the presence of visitor's centers) have been allayed by the Church's agreement as to how the Temple will be made open to non Mormons and the Church's agreement to limit certain large gatheirngs.

A number of the offers made by the Church cost substantial money (for example, the looping of water and electric utility connections); the Town could not have required that these items be done for the "by right" building. All represent an attempt to mitigate or ameliorate adverse consequences of the project.[26] The Temple proposal is better with the conditions proposed by the Church than without and the complete proposal is what the Board is to consider.[27]

With respect to traffic, the Temple itself will generate traffic. The Board doubts that the spires themselves will generate any. A traffic study was presented to and reviewed by the Board. The study was also reviewed by a town hired traffic expect, who asked for and received

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[26] It is not reasonable to suggest that the Board not consider these measures because they do not relate to the effects caused by the spires, as was suggested by the Opposition. They relate to concerns of the Neighbors, as expressed by the Neighbors. The efforts of the Church to reduce traffic effects are meaningful to the quality of life in the area.

[27] Even the Board member who voted to deny the Original Application because he felt the tallest steeple was too tall considered that the Church had satisfied its "process" burden.

additional information. The Board has experience reviewing traffic studies and is satisfied with the key conclusions: the LOS (Levels of Service) of surrounding key intersections will not be worsened and site generated traffic can be safely and efficiently accommodated on existing roadways without significant negative impact on traffic flow.

In the Board's judgment, the burdens ascribed to the additional spire height do not justify the denial of relief to the Church.

One could logically infer from G.L. c. 40A, §3, second paragraph, that churches and educational institutions are accorded their special status because of a presumption that the benefits of having churches and schools, in every town and allowable in any zoning district, always outweigh the perceived burdens, whatever they may be. The Board concludes that, by adopting the Dover Amendment, the Legislature intended to favor religions and educational institutions and enshroud their protected activity with a conclusive presumption of "benefit" regardless of the perceived burden.

The "special permit considerations" under the Bylaw are important because their satisfaction gives the Church an independent avenue for relief from the limitation on steeple height. The specific height requested by the Church can be justified by finding the proposal reasonable, after consideration of all the standards, because the Board finds the benefits (including the benefit that Dover implies for all churches) outweigh the burdens.

The Board felt the specific height asked for by the Church in the Original Application was warranted.

THE RELIEF GRANTED ON THE ORIGINAL APPLICATION

Unanimously, with respect to the Original Application, the Board found that applying the Bylaw to restrict the height of the steeples on the Temple to twelve (12) feet was unreasonable. That determination, decided under a Dover inquiry, means that some zoning relief must be granted and greater height must be permitted.

The Board, by vote of 4 in favor, 1 opposed,[28] voted to restrict the height of the steeples to a total height of 139 feet for the east central spire (79 feet above the building), 92 feet for the west central spire (32 feet above the building), and 76 feet each for the four remaining steeples (16 feet above the building). In approving these specific heights, the Board considered the purpose of steeples in Mormon theology, the proportionality of the Steeple height to building height and to the mass of the structure, the shape of the steeple above 92 feet, the deference appropriate to a church's design, as well as the general special permit considerations. After such consideration, the Board found the specific height of the spires in the Original Application was not unreasonable, i.e., the height was reasonable. (a) as a Dover type regulation of

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[28] The one dissenting member on the Original Application opposed the height of the east central spire as proposed by the Church, although he did not think that the 12 foot steeple limitation was reasonable. He favored allowance of the 76 foot height on the four corner steeples. He concurred with other Board members in concluding that, while some relief should be granted, the Board should not be the architect for the Temple.

height, (b) as a special permit matter or (c) a combination of the two.

In deciding on the Original Application and in exercising its right to regulate, the Board found that the self-imposed "conditions" or mitigation measures offered by the Church benefit the Town and should be incorporated into any approval so that they can be enforced in the same manner that special permit conditions are enforced. Indeed, while the Board has found no grave municipal concern in controlling steeple height on churches, a number of other municipal concerns (which do not relate to steeple height), are addressed by the offers made by the Church, and the offers represent something akin to " . . . compensating actions used to ameliorate negative consequences for other parties or the Town." Section 7.4.2. of the Bylaw.

AMENDED APPLICATION

In presenting the Amended Application, the Church once again complied with all dimensional requirements of the Bylaw except for the height of the single spire.[29]

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[29] At the public hearing, a question was raised as to whether a portion of the west wing exceeded the Bylaw height requirements. The Church, in amending its plan, made clear that above a certain height the area in question was not habitable space. The Building Inspector has ruled that since that are is closed to habitation, the applicable portion of the Bylaw is the footnote relative to projections and that the total height of 64 feet is within the allowance permitted by the Bylaw (56 feet plus 20% of 56 feet = 56 feet plus 11.2 feet = 67.2 feet) The Board accepts the Building Inspector's determination.

The Amended Application presents a number of dimensional reductions from the originally approved design, and it should be emphasized that in some respects the church has modified its proposal by reducing what the Church had an absolute right to build. The total gross area of the Temple was reduced from 94,100 square feet to 69,000± square feet, with most of the reduction coming in the area above grade which would be visible. The length and width of the Temple building were both reduced, although the Temple is designed to be built within the same footprint. The above grade building height has been reduced marginally from 60 feet to 56 feet. This reduction means that the maximum projection height allowed by right is 67.2 feet and the relief the Church seeks is to have the single spire exceed that height.

The surface area of the Temple has been reduced by over 30%. This is an important reduction in mass but also the reduced surface area means there is considerably less area to be illuminated. The total wattage used to illuminate the Temple has been reduced by over 30%.

The distance between the Temple and neighboring residential properties has been increased (except to the south where there has been no change) and the parking areas have also been moved further from residential properties. In addition, the Temple is now set back more from the Route 2 access roads and the Church's neighbors in Arlington.

In many respects, the modified design retains the characteristics of the original design. Site access and internal circulation remain the same; interior building materials, landscaping design and building orientation

are unchanged. All of the conditions proposed by the Applicant remain.[30]

The Church does not consider the Amended Application a substitution for the Original Application. It does not consider what it has presented a nullification of the prior Board vote. The Neighbors predictably consider that the Amended Application must be considered on its own merits and must satisfy the same test the Board applied to the Original Application.

The Board agrees to some extent with each side. The Board does not feel its prior decision is a nullity and it believes the Amended Application should be tested in the same manner as the Original Application.[31] The Board has determined that the Church has satisfied the legal standards for obtaining relief and should be allowed to proceed with the Amended Application. In approving the Amended Application, however, the Board has determined that the Temple shall be built in accordance with revised plans submitted with the Amended Application as amended through March 13, 1997 and not in accordance with the original design.

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[30] At the close of the March 13th hearing, the Neighbors presented a proposed set of conditions. The Church submitted a response. The Board, in approving the Amended Application, imposes conditions which take into consideration both the Church's and the neighbors' proposals.

[31] The Board ruled at its March 10th hearing that the public hearings would not start anew as if there had never been eight hearings on the Original Application and all testimony from the prior hearings would be accepted to the extent relevant to the Amended Application.

In modifying the original design, the Church had as its goals a simplification of the design and a lessening of the impacts on the Neighbors. While some of the Neighbors still feel the Temple is too big and too intrusive, the Board concludes that the Church has lessened some of the more objectionable effects and has done so through a process which complies with both the letter and spirit of the Bylaw.

Without waiving their position that relief should not be granted at all because the Church has failed to satisfy the legal standards on which it has the burden, the Neighbors concede that the Amended Application is "better." The Board agrees.

Much time has been spent debating the lighting plan of the Church. Fears abound that the Temple will look like the Washington, D.C. temple or at least will not look like other Belmont churches. As to the latter comparison, there is no solution except a reduction in size/mass to levels less than the by right building.

The Board seriously questions its authority to regulate the surface brightness of the Temple. First, the Bylaw does not regulate surface brightness for any property owner. Second, lighting is not a subject specified in the Dover Amendment and the Board doubts there is any legal authority for it to conclude there are other matters not enumerated by the Legislature in the Dover Amendment which a municipality can regulate. The Bylaw does however regulate overspill lighting which regulation the Church has agreed to satisfy.

On the basis that the Church, in wishing to be a good neighbor, presented lighting information in order to allay

suspicions, the Board has examined surface brightness and has accepted the Church's information in the nature of representations which should bind the Church as voluntary conditions. The lighting involved in the amended design is less than what was presented in the Original Application mainly because the surface to which light is applied or the surface from which light is reflected is so much less. While "bright spots" on less mass increase the average brightness of the total surface, that does not make the surface "brighter" in an absolute sense.

Regardless of actual brightness measured on the surface in foot lamberts, the farther one moves from a surface, the less bright the lit surface appears to the naked eye because the surface is smaller (is reduced by distance). Given that no part of the Temple is closer to a residential property than 165 feet and most properties are over a football field away from the Temple (considerably more setback than most Belmont churches used for comparison by the Neighbors), it is the Board's opinion that the lighting plan presented by the Church is reasonable and should be accepted, subject to general conditions.

On March 24, 1997, the Board deliberated on the Amended Application. Unanimously, the Board found that (i) imposing an 11.2 foot limitation on the height of the single spire was unreasonable and relief should be granted to the Church, and (ii) the Church's proposal, as reflected in the Amended Application, considered as a whole, was reasonable. The church is hereby ranted relief by the Board and shall be permitted to build the Temple in accordance with the Amended Application. No other permit or regulation by the Town under its Bylaw is necessary provided that the final plans presented are

consistent with the plans submitted to the Board, and provided further that the following Conditions are satisfied and adhered to.[32]

CONDITIONS

Before the close of the public hearings on the Amended Application, the Neighbors submitted a list of proposed conditions. The Church responded by stating its position with respect to the Neighbors' list. The Board has carefully considered the conditions offered by the Church and the protections sought by the Neighbors. It is not fair to have material information intended to allay fears or suspicions presented by an applicant an public hearings and not hold the applicant for zoning relief to compliance with the information presented. On the other hand, churches are to be exempt from the traditional use restrictions imposed by zoning bylaws, and other churches in Belmont are not regulated by the Board or by any group of neighbors as to hours of operation, types of services, etc. On balance, the Board determined that including as "conditions" matters which reflect accurately statements made by the Church should not trouble the Church from a substantive point of view, should be readily accepted by the Neighbors who raised the concerns which gave rise to the "conditions" and are further evidence of the Board's opinion that, by compromise, the result may provide more protection for the Neighbors

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[32] The Temple is subject to the requirements of any other applicable state or local code such as (without limitation) health and sanitary codes, fire codes and regulations, and the State Building Code. See *The Bible Speaks*, p. 35. footnote 15.

than a strict construction of the Dover Amendment's prohibition on use regulation would permit.

The Board concluded that the following conditions ("Conditions") are to be imposed on its grant of relief:

1. The Temple, the associated amenities and the related site conditions on the church's property shall all be constructed and developed in substantial accordance with the Church's Site Plan dated February 14, 1997, submitted to the Town with the Amended Application or through the public hearings thereon (collectively, the "Approved Site Plan"). Included within the term Approved Site Plan is the Building Exterior Illumination Report prepared by LHM Partners Inc. dated February 28, 1997 (the "Lighting Plan") as same was modified through March 17, 1997.

Substantial changes, alterations, substitutions, replacements or amendments to the Approved Site Plan shall require the approval of the Board. Nothing herein shall limit the right of the Applicant to make nonsubstantial changes and where necessary to have such changes approved by the Building Inspector.

Without limiting the foregoing, the Board states that the following are deemed to be "substantial".

1. Changes to the site access;
2. Changes in the parking configuration or the number of spaces;
3. Changes which decrease the amount of landscaping;
4. Changes in the Lighting Plan to the Extent the same result in a variance of more than 20% provided that any variance which

results in violation of the overspill regulations in the Bylaw shall be prohibited;

5. Changes relating to the time construction activities are to occur.

2. All vehicular access to the Property shall be exclusively from the Route 2 access road/Frontage Road and as shown on the Approved Site Plan. Any change in access from that approved by the Board shall require the Church to present the proposed change and the reasons therefor to the Board and shall require Board approval thereof.

3. The entire perimeter of the portion of the Church's Property being used for any activity related to site development or construction of the Temple and associated amenities shall be fenced to prevent entry or egress except through the designated construction gates. Except for activities conducted on non-Church property which are allowed by easement, contract, law or with the consent of the affected property owner, no construction related activities will be allowed on properties not owned by the Church provided nothing in this Condition 3 shall be deemed to prohibit construction equipment and supply vehicles from parking on Ledgewood Place in connection with the construction of the retaining wall and related site work on the southerly side of the Church's Property if it becomes necessary to do so. The Church agrees to use its best efforts to use only its own property to do such work in the area of the southerly boundary near the parking lot but if safety considerations make it advisable to use Ledgewood Place, upon approval by the Town Engineer, the Church may do so.

4. The forty (40) foot easement leading to Crestview Road which is set forth in a document registered with the Land Court as Document No. 380415, and noted on the Church's Certificate of Title (No. 157366) shall be used solely for utilities, including the right to install, maintain, repair and replace utilities. The easement shall not be used for vehicular or pedestrian access to the Site. All work done in the area of the easement shall be performed in a manner so as to minimize the disturbance to neighboring properties. Upon completion of any work, the area of the easement and construction shall be landscaped and returned to as near the condition it was prior to the work as possible.

5. At such time as the construction of the Temple and related site amenities has been completed and prior to the issuance of a certificate of occupancy, the Building Inspector of the Town shall certify to the Board of Appeals that all conditions set forth herein which relate to construction have been satisfied. Thereupon, unless the Board within fifteen (15) days requests a meeting with the Building Inspector, the Applicant or parties at interest (as defined in G.L. c. 40A, §11) who have in writing set forth facts from which one could conclude that conditions established by the Board have not been satisfied, or unless prohibited by law, the Building Inspector shall, consistent with his duties, issue a certificate of occupancy. Upon the issuance of notice by the Building Inspector to the Board and prior to the expiration of the aforesaid fifteen (15) day period, the Church shall execute and deliver to the Town counsel an instrument, in form and content acceptable to the Board and Town counsel and suitable for recording in the Middlesex

South Registry District of the Land Court, restricting the aforesaid forty (40) foot easement to utilities only and specifically relinquishing in perpetuity, the right to use said easement for vehicular and pedestrian traffic access to the Church's Property. Nothing herein contained relating to the time by which the permanent restriction shall be recorded is intended to imply that the Church may access its site by use of the easement for construction related activities, all of which is intended to be controlled by Condition No. 2 hereof. Should the Applicant be barred from using Frontage Road as its access, the Applicant may return to the Board to modify the conditions relating to access.

6. The site shall be landscaped in substantial accordance with the Approved Site Plan dated February 14, 1997, including the planting of at least the number of trees shown on said plan. The parking lot design, setback and landscaping shall be as set forth on the aforesaid Site Plan. To the extent reasonably possible, the parking area shall be landscaped so as to minimize its visibility from abutters' property.

7. All exterior lighting, whether on the Temple building itself or the spire or the Angel Moroni, shall be extinguished no later than 11:00 p.m. (or at whatever earlier hour all other churches in Belmont turn off all exterior lights), provided that reasonable lighting required for security and safety shall be excepted from this condition. Spillover lighting shall be controlled by the applicable provisions of the Bylaw.

   There shall be no lighting emanating from any window located above 56 feet. No lights shall shine away from the Temple. Lights in parking

areas will be directed away from abutting residences.

While specifically acknowledging that neither the Dover Amendment nor the Town's Bylaw addresses the subject of exterior lighting/surface brightness, based on the Applicant's testimony at hearings as to the amount of surface brightness the Temple will have, the Board's review of materials relative to other churches, and the Neighbors' concerns in this regard, the Board requires that surface brightness son the Temple, the spire and the Angel Moroni be in substantial accordance with the Lighting Plan as presented to the Board.

8. No blasting activities shall take place except in strict accordance with applicable laws and regulations and the following additional conditions. No blasting or drilling or rock crushing shall occur earlier than 9:00 a.m. or later than 4:00 p.m. Monday through Friday and no blasting or drilling or rock processing shall occur at all on either Saturdays or Sundays. To the extent rock crushing activities occur on the Site, all state or Town requirements shall be complied with. All blasting shall be supervised and monitored by a full time professional engineer, who must be on site during all times blasting occurs. Such services shall be substantially as set forth in a letter dated June 26, 1996 from Haley & Aldrich to Tsoi/Kobus Associates. Blasting mats will be used for all blasting rounds even if not required by law or code. The preblast survey required by law and the protections afforded those covered by the survey shall be extended to include all property owners whose property line is within 300 feet of the Church's property line.

9. All other construction activities shall take place between the hours of 7:30 a.m. and 5:00 p.m., Monday through Friday provided that the Church, or its project manager, may be allowed occasionally to have activities when reasonably necessary scheduled for weekday overtime and Saturdays (such hours limited to the minimum reasonably necessary) provided suitable advance arrangements are made through the Town Engineer's Office. Ledgewood Place, Crestview Road and Birch Hill Road may not be used for the parking of vehicles or the Storage of materials during construction.

10. All noise regulations of the Town shall be complied with.

11. Consistent with the Applicant's representations to the Board, there shall be no Visitor's Center or other tourist type accomodation at the Temple or on the Site. Nothing herein is intended or shall be construed to prohibit the Temple from having an "Arrival Center" within the Temple Building, providing coat racks, restrooms, clerical area, seats or benches and similar amenities. The Arrival Center shall not contain exhibits or displays and no items will be sold at the Arrival Center, except nothing in this Condition 11 shall be deemed to prohibit food and beverage vending machines in the Arrival Center and the sale or rental or religious vestments.

12. Consistent with the Church's representations to the Board and to the Neighbors and fully acknowledging that in the absence of such statements or voluntary conditions the Board's authority under Dover to regulate the use of the Temple building would be drastically limited, if not nonexistent, the Board nonetheless includes

within its conditions the following, all of which are consistent with statements made by the Church and many of which were contained in the Neighbors' presentation of proposed conditions. No wedding receptions, dances, pageants, parties or funerals are to be conducted in the Temple. The Temple will not be used as a day care center or nursery school or rented to outside organizations or used for fund raising activities or social events. There will be no chimes, bells or loudspeakers at the Temple. There will be no Christmas/holiday pagents at the Temple. All other Christmas/holiday lighting or displays are to be consistent with what other Belmont churches do except that there will be no holiday lighting above 56 feet and no additional lighting on the Temple building itself.

13. At the Church's sole expense, the Church will prove a water loop connection between Ledgewood Place and Crestview Road and an electric loop connection from Crestview Road to Frontage Road.

14. Drainage plans and facilities will be subject to the approval of the Town Engineer.

15. Any buses coming to the Site shall park only in specifically designated spaces. Buses shall be prohibited from idling their engines at any time for more than ten (10) minutes.

16. The Applicant shall conduct construction activities in a manner designed to minimize dust pollution. The Church has agreed to cause to be cleaned the windows of any home that is soiled by dust associated with blasting/construction activities and the Church shall arrange for such window cleaning through an independent contractor selected and paid by the Church. Such

commitment does not require the Church to pay for costs of cleaning done by property owners themselves. Cleaning shall be done as reasonably necessary and shall be limited to homes within 300 feet of the Church's Property. The commitment of the Church under this condition 16 shall cease on the date the certificate of occupancy issues.

17. Deliveries to the Site shall be made during the Temple's normal hours and in any event no earlier than 8:00 a.m. Monday through Saturday and no later than 4:00 p.m., Monday through Friday and noon Saturday. No deliveries shall be made to the Site on Sundays.

As so conditioned and based on the foregoing, relief is granted consistent with this decision.

For the Board,

_____

John W. Gahan III, Chairman

Dated: April 28, 1997

As so conditioned and based on the foregoing, relief is granted consistent with this decision.

For The Board,

/s/ John W. Gahan III
John W. Gahan III, Chairman

Dated: April 28, 1997

/s/ Illegible

/s/ Illegible

/s/ Illegible

/s/ Illegible

A TRUE COPY ATTEST: /s/ Catherine T. Stafford
Catherine T. Stafford
Town Clerk of Belmont

May 19, 1997

APPENDIX E

CONSTITUTION OF THE UNITED STATES OF AMERICA

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion . . .

APPENDIX F

MASSACHUSETTS GENERAL LAWS

Chapter 40, § 25 (1950).

> No by-law or ordinance which prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational educational purpose shall be valid.

Chapter 40A, § 3 (1997). The Zoning Act.

> No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions, or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

APPENDIX G

TOWN OF BELMONT

ZONING BY-LAW

As amended through April 22, 1996
Approved August 6, 1996

SECTION 1. GENERAL

1.1 Title and Authority

This Bylaw shall be known and may be cited as the "Zoning Bylaw of the Town of Belmont, Massachusetts" and is adopted, in accordance with and pursuant to the provisions of General Laws, Chapter 40A, as amended by Chapter 808 of the Acts of 1975 as amended.

1.2 Purposes

The purposes of this Bylaw include, but are not limited to, the following: to lessen congestion in the streets; to conserve health; to secure safety from fire, flood, panic and other dangers; to provide adequate light and air; to prevent overcrowding of land; to avoid undue concentration of population; to encourage water supply, drainage, sewerage, schools, parks, open space and other public requirements; to conserve the value of land and buildings, including the conservation of natural resources and the prevention of blight and pollution of the environment; to encourage the most appropriate use of land throughout the Town, including consideration of the recommendations of the comprehensive plan, if any, adopted by the Planning Board and the comprehensive plan, if any, of the regional planning agency; and to preserve and increase amenities by the promulgation of regulations to fulfill these purposes under the provisions of General Laws, Chapter 40A.

Regulations adopted pursuant to these purposes may include, but are not limited to, restricting, prohibiting, permitting or regulating the use, alteration, height, area

and location of buildings and structures and the use of premises in the Town of Belmont.

1.3 Basic Requirements

Any building or structure hereinafter erected, reconstructed, altered, enlarged, or moved or any use of premises hereinafter established, altered or expanded in the Town of Belmont shall be in conformity with the provisions of this Bylaw, with the following exceptions:

- certain nonconforming buildings, as provided at Section 1.5;
- certain aspects of agricultural, educational, and religious uses, as provided at Section 3 of Chapter 40A, G.L.

Any use not specifically or generically enumerated in a district herein shall be deemed prohibited.

SECTION 4. INTENSITY REGULATIONS

4.1 General Requirements

The erection, extension, alteration, or moving of a structure, and the creation or change in size or shape of a lot shall be permitted only in compliance with the intensity and dimensional requirements set forth herein, except as provided at Section 1.5 Nonconformance and at Section 6, Chapter 40A, G.L., and except for lot line changes which create neither additional lots nor increase in nonconformity.

4.2 Schedule of Dimensional Regulations

4.2.1 Area Requirements

DISTRICTS	MINIMUM LOT AREA SQ. FT	MINIMUM LOT FRONTAGE FEET	MINIMUM FLOOR AREA RATIO	MAXIMUM LOT COVERAGE % OF LOT	MINIMUM OPEN SPACE % OF LOT
SR-A	25,000	125	–	20%	50%
SR-B	12,000	90	–	25%	50%
SR-C	9,000	75	–	25%	50%
SR-D	25,000	125	–	20%	50%
GR	7,000[2]	70	–	30%	40%
AH	85,000[2]	100	–	30%	40%
LB I	–	20	1.25[1]	–	–
LB II	–	20	1.05	35%	–
LB III	–	20	1.05	35%	–
GB	–	20	–	–	–
PL	–	–	–	–	–

(1) In an LBI District, a floor area ratio up to a maximum of 1.5 may be allowed by special permit from the Board of Appeals (see § 4.4).

(2) But not less than 1,000 sq. ft. per dwelling unit for multi-family dwellings in a GR District, 1,200 sq. ft. per dwelling unit in an AH District.

4.2 Schedule of Dimensional Regulations (continued)

4.2.2 Linear Requirements

	MINIMUM SETBACK DIMENSIONS FEET			MAXIMUM BUILDING HEIGHT	
DISTRICTS	Front	Side	Rear	Feet	Stories
SR-A and SR-D					
Dwelling	30[2]	15	40[2,4]	36[5]	2 1/2[5]
Other	30[2]	15[6]	25[6]	36[5]	2 1/2[5]
SR-B and SR-C					
Dwelling	25[2]	10	30[3,4]	36[5]	2 1/2[5]
Other	25[2]	10[6]	25[6]	36[5]	2 1/2[5]
GR					
Dwelling	20[2]	10[7]	20[3]	36	2 1/2
Other	20[2]	10[7]	12[6]	36[5]	2 1/2[5]
AH	30	30	30	60	–
LB I[9]	5	6 or none[9]	6 or none[9]	28	2[10,11]
LB II[9]	10	20[9]	20[9]	32	2[10]
LB III[9]	10	20[9]	20[9]	28	2[10]
GB	5	6 or none[9]	6 or none[9]	36	–
PL	–	–	–	–	–

4.2.2 Schedule Footnotes:

(1) Chimney, towers and other projections not used for human occupation may exceed the height limitations herein provided that, except for single vertical freestanding tubular antennae; any such projection above the building exceeding 10 feet or 20% of the building height, whichever is greater, shall be allowed by special permit only.

(2) No building need be set back more than 30% of the depth of the lot in a Single Residence A or D District, 25% of the lot depth in a Single Residence B or C District, nor 20% of the lot depth in a General Residence GR District, nor more than the average of the setbacks of the buildings on the lots contiguous thereto on either side, a vacant lot, a lot occupied by a building set back more than the required minimum, or an intersecting street being counted as

(5) Greater height is permitted provided the building setback from each street and lot line exceeds otherwise applicable requirements by 10 feet plus one foot for each foot of excess height, but in no case shall building height exceed 60 feet or 4 stories in height.

* * *

7.4 Special Permits

7.4.1 Special Permit Granting Authority

At various places in this Bylaw, authority for acting on particular special permits is assigned to the Board of Selectmen, the Planning Board, or the Board of Appeals. Where no agency is specifically designated, the Board of Appeals shall act as the Special Permit Granting Authority (SPGA).

7.4.2 Special Permit Criteria

The following shall be the basis for decisions on special permits, except as may be more specifically provided elsewhere in this Bylaw. Special Permits shall be granted only if the Special Permit Granting Authority determines that the proposal's benefits to the Town will outweigh any adverse effects for the Town or the vicinity, after consideration of the following preferred qualities, among other things:

a) Location.

1) Providing adequate water, sewerage, drainage for this location should pose no special public problems.

2) The site should be able to accommodate the proposal without substantial environmental damage due to wetland loss, habitat disturbance, or damage to valuable trees or other natural assets.

b) Activity Type and Mix.

1) Residential proposals should serve housing needs of local residents, or broaden the diversity of housing within the Town.

c) Visual Consequences.

1) Views from public ways and developed properties should be considerately treated in the site arrangement and building design.

2) Visibility of parking and service areas from public streets should be minimized through site arrangement, and such areas should be screened from abutting premises.

3) Departure from the architectural scale of buildings on abutting and nearby premises should be minimized, except where the departure would serve some townscape purpose.

d) Access.

1) Access to the location should increase existing traffic (average daily, unless the Board of Appeals specifies

* * *

Supreme Court, U.S.
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No. 00-452

In the Supreme Court of the United States

MARGARET BOYAJIAN, ET AL., PETITIONERS,

v.

THOMAS GATZUNIS, ET AL., RESPONDENTS.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Establishment Clause permits a State to enact a law protecting a variety of sometimes unpopular land uses — including schools, agriculture, child care centers, homes for the disabled, solar energy facilities, certain antennae, and houses of religious worship — from exclusionary zoning by local officials.

RULES 29.6 AND 14.1 STATEMENT

Respondent Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints has no parent corporation and issues no stock.

Petitioners are Margaret Boyajian, Charles Counselman, and Jean Dickinson.

Respondents are:

Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints;

Thomas Gatzunis

John W. Gahan III

William D. Chin

Thomas P. Callahan, Jr.

Carlo Tagariello

Anthony Leccese

James D. Harrington

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Karl Tobiason

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BRIEF FOR RESPONDENTS IN OPPOSITION

This case involves an Establishment Clause chalienge to a provision of Massachusetts law that protects a variety of sometimes unpopular land uses from exclusionary zoning, and to a local zoning ordinance that permits religious uses within residential zones. The District Court and the Court of Appeals upheld these provisions. Respondents believe those decisions should not be disturbed and thus respectfully request that the Court deny the petition for certiorari.

STATEMENT OF THE CASE

A. The Church Seeks Approval To Build A Temple In The Town Of Belmont

In 1979, respondent Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints ("Church" or "LDS Church")[1] acquired an 8.9-acre lot in a residentially-zoned area in the Town of Belmont, Massachusetts. The lot borders a residential neighborhood on the south and the frontage road of Massachusetts Route 2 — one of Boston's major highways — on the north. See http://www.bostontemple.org/directions/index.html; Pet. App. 53a. The Church has conducted religious services at a meetinghouse on the property since the mid-1980s.

In 1995, the President of the Church announced a decision to construct a temple on the property (hereinafter, "the Boston Temple" or "the Temple"). In LDS religious doctrine, temples are distinct in structure and function from more typical Church meetinghouses. For instance, there are roughly 100 temples worldwide, compared with more than 11,000 Church meetinghouses. Pet. App. 2a, 68a. In addition, temples and their grounds

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[1] Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints is a religious corporation sole organized under the laws of the State of Utah for the purpose of holding assets and conducting the temporal affairs of The Church of Jesus Christ of Latter-day Saints, an unincorporated religious association. For purposes of this brief, we will not distinguish between these two entities.

are not used for conventions, revivals, day care, fund-raisers, parties, sporting events, or even Sunday congregational worship. *Id.* at 68a. They are constructed exclusively for the performance of the most sacred ceremonies in the LDS faith by the Church's most devout members. *Id.* at 2a, 68a. Thus, unlike cathedrals and comparably large houses of worship in other denominations, LDS temples typically are not used for large-scale services for multitudes of worshipers and the general public, but rather for smaller sacramental services, conducted in separate rooms and limited to faithful Church members. *Id.* at 68a-69a. Church members believe that the design and location of temples are revealed by God to the presidency of the Church, whom members sustain as prophets and apostles. *Id.* at 68a-70a. The Boston Temple is intended to serve LDS believers from all over New England.

Under the governing Massachusetts law (known as "the Dover Amendment"), as well as both the Belmont, Massachusetts Zoning Bylaw ("Bylaw") and its predecessor, religious uses are permitted in areas zoned for residential uses without need for case-by-case authorization by zoning officials. Such buildings must comply with all generally applicable land-use restrictions governing the size, placement, and height of structures, as well as health and safety, noise, historic preservation, environmental, parking, lighting, nuisance, fire, and other regulations and laws. Pet. App. 11a, 44a, 72a. It is undisputed that the Temple, both as originally proposed and as ultimately constructed, is in compliance with all such laws, with the exception of the height of its proposed steeple, discussed below. *Id.* at 91a. As originally proposed, the Temple would have had a surface area of 94,100 square feet. Because of the unusually large size of the lot, *any* landowner would have had an "absolute right," under unchallenged portions of the Bylaw, to build a house (or any number of other buildings) of that size on the property. *Id.* at 92a.

In May 1996, the Church applied to the Town's Board of Appeals ("Board") for a special permit to exceed the height limit

for the construction of six spires or steeples. From the outset, a few individuals — including but not limited to residents of the neighborhood — vigorously opposed the Temple on every conceivable ground at numerous public hearings. Pet. App. 55a, 58a, 66a-67a, 72a-74a, 81a-82a.

The Board ultimately rejected their arguments and voted to approve the special permit. Pet. App. 57a. In a gesture of good will, however, the Church asked the Board to postpone issuance of its written decision while it considered ways that it might accommodate some of the opponents' concerns. *Id.* at 3a, 52a, 86a-88a.

In February 1997, the Church filed an amended plan for the Temple that reduced its surface area by 30%, from 94,100 to 68,000 square feet, and eliminated five of its six spires. Pet. App. 3a, 52a, 92a. As before, the proposal complied with the Bylaw's requirements in every respect except for the proposed height of the single remaining steeple. *Id.* at 91a. The Church made numerous other voluntary concessions, including the routing of all temple traffic through a single frontage road entrance, eliminating any entry through the abutting residential neighborhood. *Id.* at 3a, 87a-88a, 98a. The plan further contemplated that the Temple would be set back from abutters by more than 300 feet, except in one instance where the setback would be 165 feet. *Id.* at 3a, 74a, 77a, 95a. These distances are well in excess of the setback required by the Bylaw.

Although a few individuals (including petitioners) remained opposed to the Temple's construction, in March 1997 the Board, acting unanimously, granted a special permit for construction of a steeple that would exceed the height limit. Pet. App. 95a-96a. The Board expressly found that the Church's proposal "complie[d] with both the letter and the spirit of the Bylaw." *Id.* at 94a. Respondent Thomas Gatzunis, the Town's building inspector, subsequently issued the Church a building permit. Pet. App. 33a.

B. The Construction Of The Temple And The Subsequent Filing Of This Lawsuit

Construction of the Temple began in July 1997. C.A. App. 77. In August 1998 — seventeen months after final approval of the amended plan, thirteen months after construction had begun, and well after significant progress had been made — petitioners filed this suit in federal court, challenging the facial constitutionality of the state and local zoning laws under which the Temple was authorized. They did not seek to enjoin further construction of the Temple pending resolution of their claims, and the legality of the Church's building permit has never been challenged. Accordingly, construction of the Temple, without a spire,[2] was completed in the summer of 2000. See Michael Paulson, *A Visible Faith for Mormon Church, Opening of Temple on Hill in Belmont Is Fulfillment of Dream, 'Reminder to the World,'* BOSTON GLOBE, Aug. 27, 2000, at A1.

After a month-long open house in September 2000, when thousands of visitors toured its interior, the Boston Temple was dedicated to God by the President of the Church and reserved solely for the quiet worship of faithful Church members.[3] After touring the facility, Senator Edward Kennedy described it as "magnificent." See Brian MacQuarrie, *Old Rivals Tour Mormon*

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[2] In separate state court litigation, petitioner Margaret Boyajian and other opponents of the Temple have challenged the Board's decision to grant a special permit for construction of the steeple. See *Martin v. Board of Appeals of Town of Belmont*, No. SJC-08398 (pending before Massachusetts Supreme Judicial Court). Pending resolution of that litigation, the Temple remains without a spire. That issue is not raised here.

[3] The suggestion (Pet. 5) that 100,000 people will visit the Temple annually is false. The open house attracted tens of thousands of visitors interested in touring the Temple before it closed to the public. The Temple is now open only to faithful members.

Temple: Kennedy, Romney Offer Warm Praise, BOSTON GLOBE, Sept. 9, 2000, at B1. Counsel for petitioners has announced that in the event the Court grants review and overturns the decision below, they will seek to have the Temple torn down. See Lisa Lipman, *Mormons Face Tempest in a Temple: Angry Suburban Boston Neighbors Want $30 Million Structure Razed*, CHI. TRIB., Sept. 29, 2000, at 8.

C. The Dover Amendment

The Dover Amendment (Mass. Gen. Laws ch. 40A § 3)[4] declares, as a matter of state law, that certain land uses that are important to the people of the Commonwealth — but potentially unpopular in certain areas "because of local prejudice unrelated to their compatibility with the essential nature of the existing community" — must be treated as permitted uses by local zoning ordinances. Pet. App. 12a. The Amendment was enacted in response to a notorious incident of religious discrimination in 1946, in which the Town of Dover, Massachusetts adopted a bylaw that banned religious schools from all residential neighborhoods. Four years later, the Massachusetts legislature passed "An Act Prohibiting Discriminatory Zoning By-Laws and Ordinances." See Mass. Gen. Laws ch. 40 § 25 (1950). The original version of the Amendment represented the legislature's judgment that the best way to combat religious discrimination in zoning, which frequently is difficult to prove, is to eliminate case-by-case discretionary zoning decisions regarding religious land use, and to substitute a state-wide zoning law declaring religious uses permissible in every district. Pet. App. 17a.

Since 1950, the Dover Amendment has been broadened many times to withhold local zoning authority over vulnerable land uses. Pet. App. 6a, 38a. The Amendment now precludes

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[4] For the convenience of the Court, we have reproduced the relevant state law provision, Mass. Gen. Laws ch. 40A § 3, in its entirety. See App., *infra*, 1a-4a.

or limits zoning laws that ban not only religious uses, but also nonprofit educational uses (whether secular or religious); child care centers; accommodations for physically handicapped people; agricultural, horticultural, floricultural, and viticultural uses; "facilities for the sale of produce, and wine and dairy products"; "solar energy systems or the building of structures that facilitate the collection of solar energy"; and antenna structures, to name a few. Mass. Gen. Laws ch. 40A § 3; Pet. App. 6a, 7a n.2. Thus, while the Dover Amendment "originally provided anti-discrimination protection only for uses of land for religious purposes," it "currently includes protection for a number of nonreligious uses * * * as well." Pet. App. 38a. See also *id.* at 40a ("the Dover Amendment currently provides the exemption to a broad class of land uses"). Numerous parties who use their property for nonreligious purposes have successfully invoked the Dover Amendment's protections.[5]

The Dover Amendment does not preempt most forms of land use regulation, but only shields protected uses from categorical exclusion by local authorities. Such uses remain subject to "reasonable [local] regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." Mass. Gen. Laws ch. 40A § 3. Nor does the Amendment preempt state nuisance law. Thus, contrary to petitioners (Pet. 2), those who seek to use their property for a protected use cannot simply build whatever they want regardless of the impact on neighbors. The Amendment prevents outright exclusion of various uses from municipal zones, but as the Court of Appeals observed, it "does not exempt religious property uses from substantial standard

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[5] See, *e.g.*, *Rogers* v. *Town of Norfolk*, 734 N.E.2d 1143 (Mass. 2000) (child care center); *Watros* v. *Greater Lynn Mental Health & Retardation Ass'n, Inc.*, 653 N.E.2d 589 (Mass. 1995) (shelter for mentally handicapped persons); *City of Worcester* v. *New England Institute*, 140 N.E.2d 470 (Mass. 1957) (business school).

zoning requirements that are designed to ensure compatible uses of land." Pet. App. 11a. See also *id.* at 44a (rejecting claims that the Amendment "'removes any type of real local zoning control of religious sites'" and "'prevents municipalities from imposing any conditions other than those permitted by [the Amendment]'"). Massachusetts courts have repeatedly upheld the application of local land-use requirements to property that is otherwise entitled to the Dover Amendment's protections. See, *e.g.*, *Trustees of Tufts College* v. *City of Medford*, 616 N.E.2d 433 (Mass. 1993) (dimensional, setback, and loading space requirements); *Radcliffe College* v. *City of Cambridge*, 215 N.E.2d 892 (Mass. 1966) (parking); *Southern New England Conference Ass'n of Seventh-Day Adventists* v. *Town of Burlington*, 490 N.E.2d 451 (Mass. App. Ct. 1986) (wetland protection); cf. *Community of Jesus, Inc.* v. *Cape Cod Comm'n*, Civ. A. No. 92-341 (Barnstable Super. Ct. Feb. 11, 1993) (sustaining application of architectural preservation laws).[6]

D. The Belmont Bylaw

Petitioners also challenge Belmont's Zoning Bylaw, which allows religious and educational uses in all town zones, subject to a series of generally applicable land-use regulations. Ever since 1925, when Belmont enacted its first zoning ordinance, schools and religious uses have been permitted to locate in areas zoned for residential use. Pet. App. 21a. In this respect, Belmont's Bylaw has always resembled local land-use policies nationwide, which commonly treat religious uses as compatible with residential areas. See 2 WILLIAM W. BASSETT, RELIGIOUS

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[6] The Supreme Judicial Court of Massachusetts has interpreted the Dover Amendment's preservation of "reasonable regulations" to mean that a local land-use provision "may be enforced, so long as the provision is shown to be related to a legitimate municipal concern." *Trustees of Tufts College*, 616 N.E.2d at 438. In addition, the challenger "bear[s] the burden of proving that the local requirements are unreasonable as applied to its proposed project." *Id.* at 438-439.

ORGANIZATIONS AND THE LAW § 10:15 (1997) ("The majority of jurisdictions hold that *Churches may not be excluded from residential areas*, either on First Amendment freedom of religion and assembly grounds, or on grounds that municipalities do not have authority under state enabling acts (*ultra vires*) to exclude churches as contrary to community health, safety, morals or general welfare"); accord 74 A.L.R.2d 377 § 2 (1960) (noting the "[g]eneral rule that churches cannot be absolutely excluded from residential area[s]"); KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 12.22, at 578 (4th ed. 1996). In 1978, Belmont made a technical amendment to its Bylaw to define religious and educational uses by reference to state law. The Bylaw's use table now notes that religious and educational uses are "exempted from prohibition by [the Dover Amend-ment]." C.A. App. 112.

E. Proceedings Below

On cross-motions for summary judgment, the District Court applied the familiar analysis of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and held that the Dover Amendment and the Bylaw do not violate the Establishment Clause. First, observing that the Amendment protects "a broad class of land uses" that "have historically generated discriminatory land use regulation," the court reasoned that it serves the "secular purpose" of shielding such uses from "the prejudices of local governments and certain of their constituencies." Pet. App. 38a, 40a, 42a. Likewise, the court explained, the Bylaw seeks both to advance secular land-use planning interests and to bring local law into conformity with state zoning provisions. *Id.* at 42a-43a.

Second, noting that the Dover Amendment and the Bylaw "exempt religiou[s] as well as certain nonreligious land uses" from exclusionary zoning, the court reasoned that the provisions at issue do not "'establis[h]' religion within the meaning of the First Amendment any more than * * * the property tax exemption [upheld] in *Walz* [v. *Tax Commission*, 397 U.S. 664

(1970)]." Pet. App. 44a. Rather, the provisions merely have the effect of "reduc[ing] discrimination by local governments." *Ibid.* The court also rejected claims that the Dover Amendment "'removes any type of real local zoning control of religious sites,'" stating that it "plainly subjects religious land uses to 'reasonable regulations.'" *Ibid.*[7]

The Court of Appeals affirmed. Writing for the court, Judge Coffin began by noting that it was undisputed that the Dover Amendment was designed "to prevent religious discrimination." Pet. App. 9a. "Prohibition of religious discrimination," the court explained, "is unquestionably an appropriate, secular legislative purpose." *Ibid.* The court further found that the Amendment and the Bylaw advance secular land use goals, observing that both provisions reflect a "secular judgment that religious institutions, by their nature, are compatible with every other type of land use and thus will not detract from the quality of life in any neighborhood." *Id.* at 17a.

Turning to *Lemon*'s effects prong, the court flatly rejected petitioners' "depiction of the statute as an impermissible legal hammer wielded in favor of religion." Pet. App. 10a. Given that the Dover Amendment provides that "a religious institution, no less than any other group, must comply with reasonable regulations designed to preserve a comfortable, desirable community," the court held that such a characterization "grossly exaggerates the reach of the statute." *Id.* at 10a, 11a.

The court went on to explain that the Dover Amendment fell squarely within a long line of precedent holding "that religious entities may be the beneficiaries of laws that, for secular reasons, provide benefits to a variety of groups." Pet. App. 12a. "While the original Dover Amendment was directed solely at religious uses of property," the court stated, "the provision now

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[7] Petitioners have never contended that the Dover Amendment violates the "entanglement" prong of the *Lemon* test.

includes a variety of uses linked together by the legislature's apparent judgment that these uses, though important to all communities, would be at risk of exclusion from certain zoning areas because of local prejudice unrelated to their compatibility with the essential nature of the existing community." *Id.* at 11a-12a. As the court reasoned:

> In protecting religious, educational, agricultural and the other listed uses of property from exclusion — whether resulting from discrimination or simply from a general aversion to change in the neighborhood — Massachusetts evidences "an affirmative policy that considers these groups as beneficial and stabilizing influences in community life," wherever they are located. The Supreme Court has time and again made it clear that to include religion in such a category is not to advance religion in contravention of the Establishment Clause. The collection of favored uses in the Dover Amendment is amply diverse in the context of zoning to support such a determination.

Pet. App. 12a-13a (quoting *Walz*, 397 U.S. at 673). The court thus concluded that "[b]y protecting religious uses of land among others that are favored by communities generally, but that may encounter particular neighborhood disfavor, the Dover Amendment does not itself advance religion but clears the way so that churches themselves may do so." *Id.* at 20a. In sum, the Amendment "does not constitute a fostering of, or favoritism toward, religion over non-religion." *Id.* at 17a.[8]

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[8] While unnecessary to its decision, the Court of Appeals went on to state that it would uphold the challenged provisions even if they were limited "exclusively to religious organizations." Pet. App. 13a. Quoting this Court's holding in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987), that when "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, [there is] no reason to require that the exemption come packaged with benefits to secular entities," the court explained:

Chief Judge Torruella dissented, but openly acknowledged his basic "agreement with the majority as to the legal standards which * * * apply to this case." Pet. App. 22a. The majority and dissent thus differed only in their view of the "application of those standards" to the particular facts of this case. *Ibid.*

On June 22, 2000, the Court of Appeals unanimously denied the petition for rehearing and rehearing en banc. Pet. App. 49a-50a. This petition followed.

REASONS FOR DENYING THE PETITION

The petition for certiorari rests on the claim that the Dover Amendment and Belmont Bylaw single out religious land use for special and extraordinary treatment that is unavailable to nonreligious land uses. Petitioners assert that the challenged provisions provide "a special and unconstitutional benefit for religion." Pet. 16. Using various terminology, they claim that the Dover Amendment is "a *sui generis* law aiding religion," a "sweeping benefit for all religious purposes," and "a classic instance of the government preferring 'religion over nonreligion.'" *Id.* at 3 n.1, 16-17, 18. They further say that the law "subjugates

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> Massachusetts' effort to eliminate local zoning discrimination is fully in line with the [Supreme] Court's approval of government actions aimed at lifting burdens from the exercise of religion. Not only was the Dover Amendment at its origin a defensible response to an actual incident of discrimination, but [in light of evidence of ongoing problems of religious discrimination in zoning] protections against land use bias continue to be supportable fifty years later.

Id. at 14a. Contrary to petitioners' implication (Pet. 6), however, the Court of Appeals' analysis of whether these provisions would constitute a permissible accommodation if limited to religious uses was not a necessary or principal part of its holding. Remarkably, petitioners utterly fail to mention the Court's analysis of the breadth of the provisions at issue.

community self-determination" by "exempt[ing] all religious organizations and individuals from zoning restrictions." *Id.* at 9, 15.

As the Court of Appeals observed, petitioners' "depiction of the statute as an impermissible legal hammer wielded in favor of religion both grossly exaggerates the reach of the statute and understates the recognition that religion may be given consistent with the Establishment Clause." Pet. App. 10a-11a. "As for the statute's scope," the court stated, "it does not exempt religious property uses from substantial standard zoning requirements that are designed to ensure compatible uses of land." *Id.* at 11a. And "[a]s for the statute's assertedly improper focus on religion, plaintiffs err in two respects: the statute does not benefit only religious uses, and even if it did, such unique treatment can withstand constitutional scrutiny." *Ibid.*

The petition thus reflects little more than petitioners' disagreement with the two lower courts over their interpretation of the Dover Amendment and the Belmont Bylaw. Even the dissenting judge on the panel acknowledged that this case does not raise any serious issue about the proper "legal standards" applicable to zoning of religious uses, but is merely an argument about the "application of those standards" to the particular facts of this case. Pet. App. 22a (Torruella, C.J., dissenting). It would thus be inappropriate to use this Court's certiorari jurisdiction to review the Court of Appeals' interpretation of the scope of this unique Massachusetts statute.

Petitioners candidly admit that "there is no split between the circuits" (Pet. 14), and they cite three appellate decisions that are in accord with the decision below. *Id.* at 12. They do not claim that the decision below is in conflict with any decision of this Court. Indeed, they acknowledge (at 14) that the lower courts have uniformly concluded that laws of the sort challenged here are valid under the authority of *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), and *Corporation of Presiding Bishop* v. *Amos*,

483 U.S. 327 (1987). Although they attempt to portray the issues as having recurring significance, they conceded below that "this case *is the first to address this type of zoning favoritism for religious uses*." Rehearing Pet. 10 (emphasis added). Nor do petitioners claim that the Massachusetts statute is typical of legislation elsewhere (and it is not). The case thus fails to satisfy any of the criteria for certiorari under Rule 10.

What is more, several justiciability and prudential concerns make this case a poor vehicle for resolving the question presented. Even if petitioners were correct about the validity of the Dover Amendment and the Belmont Bylaw, it is far from clear that their alleged injury would be redressible, in light of several adequate and independent grounds for denying relief under Massachusetts law. The challenge to the statutes was brought late — 17 months after the decision under attack, and more than a year after construction work had begun — and the Temple is now complete and in use. Moreover, even if the case had been timely filed, and even if the laws at issue were invalidated, the same result would have occurred under the prior law, which petitioners do not attempt to argue is invalid. The Petition thus amounts to a request for an advisory opinion that the Dover Amendment and Belmont Bylaw are facially unconstitutional.

A. The Petition Rests On A Fundamental Mischaracterization Of The Statutes.

Petitioners' central theme is that the Dover Amendment and the Belmont Bylaw grant religion — and religion alone — a "total exemption from zoning requirements." Pet. 14. Indeed, they say that these laws grant religious landowners "unilateral power" to decide "whether a neighborhood [is] livable." *Id.* at 2.

This argument badly misrepresents the statutory scheme in two critical respects. *First*, it ignores the fact that the Dover Amendment protects a wide range of nonreligious uses, as well as religious uses, from exclusionary local zoning. For example,

the Amendment precludes or limits local zoning laws that interfere with the use of land for "educational purposes," for any "child care facility," for "congregate living arrangements among non-related persons with disabilities," for "agriculture, horticulture, floriculture, or viticulture," for "facilities for the sale of produce, and wine and dairy products," for "structures that facilitate the collection of solar energy," and for certain "antenna structure[s]." Mass. Gen. Laws ch. 40A § 3. Thus, as both of the courts below recognized, "[w]hile the original Dover Amendment was directed solely at religious uses of property, the provision now includes a variety of uses linked together by the legislature's apparent judgment that these uses, though important to all communities, would be at risk of exclusion from certain zoning areas because of local prejudice unrelated to their compatibility with the essential nature of the existing community." Pet. App. 12a; accord *id.* at 38a (the Dover Amendment "currently includes protection for a number of nonreligious uses").

That the Dover Amendment protects various nonreligious as well as religious land uses is confirmed by Massachusetts case law. Earlier this year in *Rogers* v. *Town of Norfolk*, 734 N.E.2d 1143, 1150 (Mass. 2000), for example, a landowner successfully invoked the Amendment against a municipality that attempted to prevent her from adapting a residence for use as a secular child care facility. Accord *Petrucci* v. *Board of Appeals*, 702 N.E.2d 47, 50 (Mass. App. Ct. 1998). Similarly, *Watros* v. *Greater Lynn Mental Health & Retardation Ass'n, Inc.*, 653 N.E.2d 589, 593 (Mass. 1995), held that the Amendment barred a municipality from excluding shelters for mentally handicapped adults. And *City of Worcester* v. *New England Institute*, 140 N.E.2d 470, 472 (Mass. 1957), extended the Amendment's protection of "public, religious, sectarian or denominational" schools to private secular schools, reasoning that all schools serve a public "educational purpose." In sum, numerous parties who use their land for secular purposes have succeeded in

invoking the Dover Amendment's prohibition of exclusionary zoning.

Moreover, when viewed together with the Bylaw, the practical effect of the Dover Amendment is to place protected uses on the same footing as other uses deemed appropriate for particular zones under the local zoning plan. Agricultural uses, detached single-family dwellings, municipal recreational uses (*e.g.*, parks, golf courses, baseball diamonds, swimming pools), and accessory uses such as greenhouses and tennis courts, to name a few, are permitted as of right to locate in residentially zoned areas in Belmont. See C.A. App. 111-114 (Bylaw § 3.3). The treatment accorded to churches, schools, and the other uses listed in the Amendment is precisely the same as that accorded these other permitted uses. This utterly refutes the notion that religious uses are singled out for extraordinary benefit.[9]

Second, petitioners' claim ignores the extent to which land uses protected by the Dover Amendment are subject to generally applicable land-use regulations. Petitioners assert that the Amendment gives religious landowners the power "to trump local community zoning laws" on issues like "noise, intrusive lighting, traffic congestion, and drainage problems." Pet. 11, 12. But as the Amendment plainly states, "such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." Mass. Gen. Laws ch. 40A § 3. As the decision below explains, the Amendment merely preempts exclusionary zoning and "does not exempt religious property uses from substantial standard zoning requirements that are designed to ensure

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[9] Petitioners' suggestion that a "philosophical bookstore" (Pet. 18) would not be entitled to protection under the Dover Amendment is not the least bit troubling. The zoning ordinances of virtually every community distinguish noncommercial and commercial uses, and the latter are frequently excluded from residential areas.

compatible uses of land." Pet. App. 11a. See also *ibid.* ("a religious institution, no less than any other group, must comply with reasonable regulations designed to preserve a comfortable, desirable community)."

The First Circuit's interpretation of the law is confirmed by numerous Massachusetts state court decisions. In *Trustees of Tufts College*, for example, the Supreme Judicial Court held that a local land-use provision "may be enforced, so long as [it] is shown to be related to a legitimate municipal concern," and that the challenger "bear[s] the burden of proving that the local requirements are unreasonable as applied to its proposed project." 616 N.E.2d at 438-439. Applying these standards, the courts have required otherwise protected uses to satisfy an array of local mandates, including dimensional, setback, and loading space requirements (*ibid.*), parking regulations (*Radcliffe College* v. *City of Cambridge*, 215 N.E.2d 892 (Mass. 1966)), environmental provisions (*Southern New England Conference Ass'n of Seventh-Day Adventists* v. *Town of Burlington*, 490 N.E.2d 451 (Mass. App. Ct. 1986)), and regulations designed to preserve the architectural and historical character of the community (*Community of Jesus, Inc.* v. *Cape Cod Comm'n*, Civ. A. No. 92-341 (Barnstable Super. Ct. Feb. 11, 1993)). The Amendment "strike[s] a balance between preventing local discrimination against [a protected] use * * * and honoring legitimate municipal concerns that typically find expression in local zoning laws." *Trustees of Tufts College*, 616 N.E.2d at 437-438. As a review of the record attests, the Church here was subject to an extensive array of land use regulations. Petitioners' assertion that religious landowners are given "carte blanche" in zoning (Pet. 14) is therefore without merit.

In the end, it turns out that the question presented — whether a state may "exempt all religious organizations and individuals from zoning restrictions" (Pet. 9) — is not really presented at all. As the courts below held, the protections of the Amendment extend "to a broad class of land uses" (Pet. App. 40a), and those

uses remain subject to reasonable land use regulation. But even if petitioners' "grossly exaggerate[d]" (Pet. App. 10a) depiction of the statute were not belied by its plain language as well as Massachusetts case law, it would make little sense for this Court to review a decision where the real dispute is over the scope and meaning of a unique state law.

B. The Petition Amounts To A Request For An Advisory Opinion.

Quite apart from the fact that the question as framed by the petitioners is not presented by these facts, several adequate and independent state grounds make it doubtful that petitioners could obtain any relief even if they succeeded on the merits of their facial challenge to the provisions at issue. The petition is, in effect, a request for an advisory opinion.

First, petitioners waited to file suit until 17 months after the Board's authorization of a building permit, which is the decision under attack. By that time, construction on the Temple had been underway for more than a year. But even at that late juncture, petitioners never moved for interim relief. Accordingly, work on the Temple proceeded, and the building is now complete, has been dedicated, and is in use. Under Massachusetts doctrines of estoppel and laches, therefore, relief is not available.

In the classic case of *Green* v. *Richmond*, 29 N.E. 770, 770 (Mass. 1892), the Supreme Judicial Court held that injunctive relief "will not be issued * * * when it appears that there has been unreasonable delay by the party seeking it" or when it "would subject the other party to great inconvenience and loss." Even in cases where the defendant's construction project has physically encroached on the plaintiff's property, Massachusetts courts have frequently denied injunctive relief to plaintiffs who stood by without objecting while the defendant built the offending structure, or where restoring the property to its prior condition would impose a great hardship upon the defendant. See, *e.g.*, *Loughlin* v. *Wright Mach. Co.*, 173 N.E. 534, 535

(Mass. 1930); *Lynch* v. *Union Inst. for Sav.*, 34 N.E. 364, 365 (Mass. 1893); *Levi* v. *Worcester C.S. Ry.*, 78 N.E. 853, 854 (Mass. 1906); see also *Davenport* v. *Broadhurst*, 406 N.E.2d 1030, 1034 (Mass. App. Ct. 1980) (doctrine of laches "may save a defendant from the expense of removing a structure built on another's land"); 28 A.L.R.2d 679 § 11 (1953) ("The right of a plaintiff to a mandatory injunction for the removal of an encroachment by an adjoining landowner may be defeated by acquiescence, delay, or laches"). As one leading commentator illustrates:

> X begins building a garage while N, a neighbor, stands by watching. N makes no objection, but when X completes the job, N says politely, "I think you have built the garage on my land." He then orders a survey and finds that it is indeed so. N then sues in equity to force removal of the offending structure. Almost certainly relief will be denied for one reason or another.

DAN B. DOBBS, REMEDIES § 2.3, at 42 (1973). See also *id.* § 5.7, at 360 ("Certainly the plaintiff who stands by and makes no protest as a large factory is built next door has the 'equities' against him and an injunction is apt to be denied in such cases under doctrines of laches or estoppel"); *id.* § 2.3, at 42 n.12 ("Even if N never knew of the activity and could not be estopped, courts might deny relief on a balancing of hardships").

These cases are consistent with federal remedial principles in Establishment Clause cases. *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973) ("*Lemon II*"), is instructive in this regard. There the Court addressed the validity of a lower court's refusal to enjoin payments to religious schools for educational services provided prior to *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) ("*Lemon I*"), which invalidated such payments. Noting that "reliance interests weigh heavily in the shaping of an appropriate equitable remedy," the Court held that two main factors — "the expenses incurred by the schools in reliance on the state statute," and the

plaintiffs' "choice not to press for interim injunctive [relief]" — made it inequitable to enjoin payment for services provided prior to the Court's ruling in *Lemon I*. See 411 U.S. at 203, 204.

Although some modern Massachusetts cases have relaxed the principle of laches in cases where construction encroached on another person's property,[10] there is no authority for requiring a landowner to raze a building that rests entirely on his own property and complies with governing land-use rules. Such relief would encourage vexatious and unreasonable litigation tactics. The Church has incurred substantial expense in reliance upon the statute, which has existed for 50 years and has been enforced on behalf of other religious property owners. See, *e.g.*, *Sisters of Holy Cross* v. *Town of Brookline*, 198 N.E.2d 624 (Mass. 1964); *The Bible Speaks* v. *Board of Appeals*, 391 N.E.2d 279 (Mass. App. Ct. 1979). To permit petitioners to have the Temple torn down at this late stage would turn "the practical realities of the situation" on their head (*Lemon II*, 411 U.S. at 205) and impose a great hardship on respondents.[11] Such inequitable relief is simply not available under Massachusetts law.

Second, it is well settled under Massachusetts law that where a court invalidates a statutory amendment such as the provisions challenged here, the effect is to resurrect the law as it existed prior to amendment. See *Opinion of the Justices*, 168 N.E. 536, 538 (Mass. 1929) (noting that "when a statute whereby an attempt has been made to amend previously existing statutes has been declared unconstitutional, the previously existing statutes survive untarnished"); *Commonwealth* v. *Gagnon*, 443 N.E.2d 407, 408 & n.2 (Mass. 1982) (invalidation of severable

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[10] See, *e.g.*, *Peters* v. *Archambault*, 278 N.E.2d 729, 730 (Mass. 1972).

[11] Other than removal of the offending structure, petitioners have not specified any relief to which they might be entitled.

amendment to statute "serve[s] to validate the prior statute"). Upon invalidating amendments to local zoning provisions, several Massachusetts courts have invoked this principle and enforced prior versions of those statutes. See *Beal* v. *Building Comm'r*, 234 N.E.2d 299, 300 (Mass. 1968) (enforcing zoning ordinance "as it existed * * * prior to the amendment"); accord *Mitchell* v. *Board of Selectmen*, 190 N.E.2d 681, 683 (Mass. 1963); *Cross* v. *Planning Bd.*, 189 N.E.2d 189, 190-191 (Mass. 1963).

If this Court were to strike down the challenged provisions, therefore, the applicable law would be the Belmont bylaw that was in effect before it was "amended to reflect the requirements of the Dover Amendment." Pet. App. 21a. Like the zoning ordinances of so many communities across the nation, the prior bylaw permitted religious uses to locate in any residential zone. *Ibid.* Petitioners do not claim that it is unconstitutional to allow churches as permitted uses in residential areas. Accordingly, even if this Court were to review and reverse the decision below, the Church would still be entitled to a building permit, and nothing would be changed.

In light of the obstacles to relief under state law, the petition fails to present a justiciable controversy. As this Court stated in *Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983), where "the same judgment would be rendered" after the Court "corrected [the lower court's decision]," review "amount[s] to nothing more than an advisory opinion." See *Hewitt* v. *Helms*, 482 U.S. 755, 761 (1987) ("The real value of the judicial pronouncement — what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion — is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff"). Such is the case here.

If the issue of religious land use is worthy of this Court's consideration, there will be ample opportunity to address it in the context of a real case or controversy. There is no need for

the Court to spend its time on a case that, upon full examination, is likely to prove nonjusticiable.

C. The Petition Fails To Satisfy Any Of The Traditional Criteria For Certiorari Review.

Even setting the foregoing problems aside, petitioners fail to satisfy this Court's criteria for granting review. They assert (at 13) that the issue presented "has been percolating in the lower courts for years," but concede that "there is no split between the circuits." Pet. 14. Nor do petitioners claim a conflict between the decision below and any decision of this Court. To the contrary, they candidly acknowledge (at 14) that the lower courts have uniformly concluded that statutes of this sort are consistent with the Court's holdings in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), and *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987).[12] Citing a string of newspaper articles and inapposite cases, petitioners endeavor to create the impression that factual scenarios like this recur daily across the nation. But they conceded below that "this case *is the first to address this type of zoning favoritism for religious uses*." Rehearing Pet. 10.

A review of the cases cited by petitioners verifies that this is the first (and only) case of its kind. *Forest Hills Early Learning Center, Inc.* v. *Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988), involved the validity of a state *licensing* exemption for religious child care facilities. *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church* v. *City of New York*, 914 F.2d 348 (2d Cir. 1990), involved a *free exercise* challenge to a historic preservation law. And the three other cases petitioners cite sustained laws that were far more targeted toward religion

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[12] Petitioners argue that "it makes little sense for this Court to await such a split [in the circuits]" because every lower court to consider the issue has come to the same conclusion. Pet. 14. This is a new idea: that uniformity among the circuits is a basis for granting certiorari.

— and thus, under their theory, far more problematic — than the laws at issue here. See *Ehlers-Renzi* v. *Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000) (upholding accommodation of religious schools); *Cohen* v. *City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993) (upholding accommodation of religious day care centers); *East Bay Asian Local Dev. Corp.* v. *State*, 81 Cal. Rptr. 2d 908 (Ct. App.), *review granted*, 977 P.2d 692 (Cal. 1999) (upholding accommodation in historic preservation law). Thus, even crediting petitioners' claim that these are comparable decisions, they merely confirm the correctness of the decision below.

The decision below lacks other hallmarks of certworthiness as well. Petitioners make no claim that other states have laws similar to the Dover Amendment, and they do not. No grave injustice has been done, and no matter of national importance is at stake. The Belmont Board of Appeals, which is the lawfully appointed representative of the people most directly involved, unanimously concluded that the Temple complies "with both the letter and spirit" of the Town's zoning laws. Pet. App. 94a. It is time to put this neighborhood disagreement to rest.

D. The Dover Amendment And The Bylaw Do Not Violate The Establishment Clause.

Finally, on the merits, there is no reason to disturb the careful and well-reasoned decision of the First Circuit. Indeed, beyond their rhetoric about giving "sweeping benefit[s]" to religion (Pet. 3 n.1) and "subjugat[ing] community self-determination" (*id.* at 15), petitioners have not suggested any coherent theory of the Establishment Clause under which the challenged provisions are unconstitutional. Surely they do not suggest that it is unconstitutional to treat religious uses as permitted uses in residential zoning areas. That would fly in the face of standard zoning practice and disrupt local zoning law all over the country. But it is equally untenable to think that religious uses may be permitted only on a discretionary case-by-case basis. That would

be an invitation to arbitrariness and unequal treatment. Nor do petitioners seem to believe that religious uses may not be addressed as such, or given special treatment, in land use law. Again, that would upset the settled practice of practically every jurisdiction in the country. In short, petitioners complain about the Massachusetts law, but they offer no theory about what sort of land use law would satisfy their understanding of the First Amendment.

The Court of Appeals' analysis, by contrast, is supported by a long line of this Court's precedents holding that government benefits made available to a class including both secular and religious beneficiaries do not violate the Establishment Clause.

In *Walz*, 397 U.S. at 673, the Court upheld a state property tax exemption made available to "a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups," among others. Noting that the state had not "singled out one particular church or religious group or even churches as such," the Court rejected the claim that it was unconstitutional to permit religious organizations to share in the benefit. *Ibid.* Insofar as "hostility toward religion has taken many shapes and forms," the Court explained, the challenged exemptions were "a reasonable and balanced attempt" to combat "latent dangers inherent in the imposition of property taxes." *Ibid.* Both before and since *Walz*, the Court has repeatedly affirmed the validity of laws that, for secular reasons, grant benefits to a range of religious and nonreligious beneficiaries. *E.g.*, *Bowen* v. *Kendrick*, 487 U.S. 589 (1988); *Mueller* v. *Allen*, 463 U.S. 388 (1983); *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989); *Everson* v. *Board of Educ.*, 330 U.S. 1 (1947).

The Dover Amendment and Belmont Bylaw fall squarely within this line of precedents. They do not "single out" religious groups for a benefit unavailable to others. Rather, religious land

use is merely one part of "a broad class of land uses" (Pet. App. 40a) — including schools, child care centers, accommodations for the disabled, agriculture, and solar energy, to name a few — that are protected from "latent dangers" of exclusionary zoning. Petitioners would have no more (and no less) right to object to the prospect of a farm, a noisy school playground, a municipal basketball court or swimming pool, or a child care facility than to the Temple (or any other church, synagogue, or mosque). See C.A. App. 111-114. In short, there can be no claim that these laws favor religion over nonreligion.

Petitioners say there is no "rhyme or reason" or "neutral and secular criterion" that explains the "grab bag" of uses protected by the Amendment. Pet. 3 n.1. But that is simply false. As the Court of Appeals explained, this "variety of uses" is "linked together by the legislature's apparent judgment that these uses, though important to all communities, would be at risk of exclusion from certain zoning areas because of local prejudice unrelated to their compatibility with the essential nature of the existing community." Pet. App. 12a. The Amendment thus serves to "preven[t] churches and nonreligious activities from being subjected to discrimination generated by the prejudices of local governments and certain of their constituencies." *Id.* at 38a.

Even where a statutory accommodation is limited to religion, it is well settled that "a claimant alleging 'gerrymander' must be able to show the *absence* of a neutral, secular basis for the lines government has drawn." *Gillette* v. *United States*, 401 U.S. 437, 452 (1971) (emphasis added). Petitioners have plainly failed to carry that burden here. The Amendment and Bylaw "represen[t] a secular judgment that religious institutions, by their nature, are compatible with every other type of land use and thus will not detract from the quality of life in any neighborhood." Pet. App. 17a. This judgment more than satisfies the "purpose" prong of *Lemon I*, 403 U.S. at 612. See *Mueller*, 463 U.S. at 394-395 (noting the Court's "reluctance to attribute unconstitutional

motives to the states" where some "plausible secular purpose" explains their actions).[13]

Petitioners concede that the antidiscriminatory purpose of the Dover Amendment was entirely legitimate. Pet. 10. They argue, however, that it was improper for Massachusetts to achieve this purpose by means of a ban on the exclusionary zoning of religious uses. They suggest that it would have been better to continue to allow discretionary case-by-case decisions about religious land use, subject to a law prohibiting overt discrimination. *Ibid.* According to them, the legislature "hastily overreacted to the Dover situation," and its chosen means of addressing discrimination against religious land use is "dramatically over-inclusive." *Id.* at 10, 3 n.1.

This argument disregards the realities of the situation. A governmental body faced with whether to allow religious uses

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[13] Even if the challenged provisions protected only religious uses, they would nonetheless withstand constitutional scrutiny. As this Court stated in *Amos*, 483 U.S. at 338, "[w]here * * * government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, [there is] no reason to require that the exemption come packaged with benefits to secular entities." The provisions here not only relieve the burden on religious exercise imposed by discriminatory land use decisions; they avoid barriers to communal worship by ensuring that religious houses of worship are able to serve parishioners in every zone. As the Court of Appeals explained, "[b]y protecting religious uses of land among others that are favored by communities generally, but that may encounter particular neighborhood disfavor, the Dover Amendment does not itself advance religion but clears the way so that churches themselves may do so." Pet. App. 20a. This is plainly consistent with the requirements of the Establishment Clause. See *Amos*, 483 U.S. at 337 ("A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence").

in a residential area has limited options. It can forbid religious uses outright — an exceedingly uncommon option that no one (even petitioners) has advocated here. See pp. 7-8, *supra*. It can permit such uses on a case-by-case, "special permit" basis, based on the discretion of local zoning officials. Or it can permit them as a matter of right.[14]

Viewed against this backdrop, the advantage of permitting religious uses as a matter of right is obvious. Discretionary case-by-case judgments by local officials about which religious uses to permit are susceptible to unfairness as well as conscious or unconscious bias. *E.g.*, *Lubavitch Chabad House, Inc.* v. *City of Evanston*, 445 N.E.2d 343, 346-347 (Ill. App. Ct. 1982); see also Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 776-777 (1999). Because virtually any land use ruling can be justified on *some* ostensibly neutral ground, discrimination is difficult to detect and even more difficult to prove. It may not become clear that an adverse zoning decision is motivated by anti-religious bias until a pattern or practice has been revealed. By that time, a church may have suffered two, three, or more denials, at significant cost and with irreparable injury to its mission. Particularly in light of expert opinion and experience, which shows that religious uses are compatible with residential zones,[15] the legislature is entitled to

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[14] Petitioners do not suggest that governmental officials may not treat religious use as an independent land use category, as does virtually every municipality across the nation. It should go without saying that there are ample secular reasons for such a classification, ranging from aesthetic and architectural concerns to issues related to the assembly of large congregations and the needs of parishioners for a proximate place to worship.

[15] As one leading authority has explained:

> Usually, religious uses are specifically permitted in residential districts, including those confined primarily to single-family

reach the conclusion that a categorical rule regarding religious land use is the best solution to the problem.

Indeed, even apart from concerns about discrimination, a legislature might reasonably conclude that uses of a religious nature are generally compatible with the full range of zoning classifications. Churches on the street corner are a familiar sight in virtually every residential area, and steeples are a hallmark of the New England landscape. Even apart from their spiritual significance, houses of worship typically offer open space, architectural interest, and services (religious and otherwise) that are welcome to the local community.

Moreover, as a stroll past Trinity Church at Copley Square demonstrates, houses of worship are as compatible with Boston's commercial district as with the many residential neighborhoods across the state of Massachusetts. To the extent that *particular* types of religious use (*e.g.*, a religious convention hall) are incompatible with a neighborhood, such cases can be dealt with by application of generally applicable land-use restrictions. Thus, the Dover Amendment strikes a balance: it protects religious uses from arbitrary exclusion from any zone, but "moderate[s]" this protection with "the requirement that religious uses conform to the standard physical limitations imposed on all buildings located in that zone." Pet. App. 16a. As the First Circuit observed, this is a perfectly sensible way "to preserve a comfortable, desirable community." *Id.* at 11a.

> dwellings. * * * Religious uses serve people best when they are accessible to homes. Religious buildings provide convenient meeting places for youth groups and civic associations. This need can be filled best when the religious institution is convenient to the residents who attend. * * * The wide majority of courts hold that religious uses may not be excluded from residential districts.

2 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 12.22 (4th ed. 1996) (footnotes and citations omitted).

Nor is there anything suspect about the legislature's decision to enact a *statewide* solution to the problem of exclusionary zoning. Petitioners claim that the Dover Amendment interferes with "local self-determination" (Pet. 13), but the zoning power is, and always has been, constitutionally vested in the legislature of the Commonwealth of Massachusetts, which has plenary authority to delegate — or not to delegate — any portion of this power to the local level. See Mass. Const. Amend. art. 2, § 6; *Board of Appeals* v. *Housing Appeals Committee*, 294 N.E.2d 393, 409 (Mass. 1973) (holding that the legislature has "supreme power in zoning matters" that overrides zoning regulations "inconsistent with the constitution or laws enacted by the general court [*i.e.*, the legislature]"). It is unquestionably lawful, under state law, for the legislature to withhold "from all municipalities all power to limit the use of land" (*Attorney General* v. *Dover*, 100 N.E.2d 1, 3 (Mass. 1951) (upholding the Dover Amendment under the Massachusetts Constitution)), and the federal Constitution does not disturb this allocation of power. See *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178 (1907) (it "rests in the absolute discretion of the State" to "modify or withdraw" municipal powers).

In short, the judgment of the Court of Appeals was entirely consistent with this Court's interpretations of the Establishment Clause. Petitioners' preference for discretionary case-by-case determinations regarding religious land use would be far more injurious to the values of the First Amendment, by embroiling local officials in decisions about the relative value of different religious uses, with the attendant danger of bias and inequality.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Mass. Gen. Laws ch. 40A (1997)

§ 3. Subjects which zoning may not regulate; exemptions; public hearings; temporary manufactured home residences

No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, horticulture, floriculture, or viticulture; nor prohibit, or unreasonably regulate, or require a special permit for the use, expansion, or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture, or viticulture, including those facilities for the sale of produce, and wine and dairy products, provided that during the months of June, July, August, and September of every year or during the harvest season of the primary crop raised on land of the owner or lessee, the majority of such products for sale, based on either gross sales dollars or volume, have been produced by the owner or lessee of the land on which the facility is located, except that all such activities may be limited to parcels of more than five acres in area not zoned for agriculture, horticulture, floriculture, or viticulture. For such purposes, land divided by a public or private way or a waterway shall be construed as one parcel. No zoning ordinance or by-law shall exempt land or structures from flood plain or wetlands regulations established pursuant to general law. For the purpose of this section, the term horticulture shall include the growing and keeping of nursery stock and the sale thereof. Said nursery stock shall be considered to be produced by the owner or lessee of the land if it is nourished, maintained and managed while on the premises.

No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall any

such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. Lands or structures used, or to be used by a public service corporation may be exempted in particular respects from the operation of a zoning ordinance or by-law if, upon petition of the corporation, the department of telecommunications and energy shall, after notice given pursuant to section eleven and public hearing in the town or city, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public; provided however, that if lands or structures used or to be used by a public service corporation are located in more than one municipality such lands or structures may be exempted in particular respects from the operation of any zoning ordinance or by-law if, upon petition of the corporation, the department of telecommunications and energy shall after notice to all affected communities and public hearing in one of said municipalities, determine the exemptions required and find that the present or proposed use of the land or structure is reasonably necessary for the convenience or welfare of the public.

No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. As used in this paragraph, the term "child care

facility" shall mean a day care center or a school age child care program, as those terms are defined in section nine of chapter twenty-eight A.

Notwithstanding any general or special law to the contrary, local land use and health and safety laws, regulations, practices, ordinances, by-laws and decisions of a city or town shall not discriminate against a disabled person. Imposition of health and safety laws or land-use requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination. The provisions of this paragraph shall apply to every city or town, including, but not limited to the city of Boston and the city of Cambridge.

Family day care home, as defined in section nine of chapter twenty-eight A, shall be an allowable use unless a city or town prohibits or specifically regulates such use in its zoning ordinances or by-laws.

No provision of a zoning ordinance or by-law shall be valid which sets apart districts by any boundary line which may be changed without adoption of an amendment to the zoning ordinance or by-law.

No zoning ordinance or by-law shall prohibit the owner and occupier of a residence which has been destroyed by fire or other natural holocaust from placing a manufactured home on the site of such residence and residing in such home for a period not to exceed twelve months while the residence is being rebuilt. Any such manufactured home shall be subject to the provisions of the state sanitary code.

No dimensional lot requirement of a zoning ordinance or by-law, including but not limited to, set back, front yard, side yard, rear yard and open space shall apply to handicapped access ramps on private property used solely for the purpose of

facilitating ingress or egress of a physically handicapped person, as defined in section thirteen A of chapter twenty-two.

No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare.

No zoning ordinance or by-law shall prohibit the construction or use of an antenna structure by a federally licensed amateur radio operator. Zoning ordinances and by-laws may reasonably regulate the location and height of such antenna structures for the purposes of health, safety, or aesthetics; provided, however, that such ordinances and by-laws reasonably allow for sufficient height of such antenna structures so as to effectively accommodate amateur radio communications by federally licensed amateur radio operators and constitute the minimum practicable regulation necessary to accomplish the legitimate purposes of the city or town enacting such ordinance or by-law.

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No. 00-452

In The

Supreme Court of the United States

MARGARET BOYAJIAN, CHARLES COUNSELMAN, AND JEAN DICKINSON,

Petitioners,

versus

THOMAS GATZUNIS, BUILDING INSPECTOR OF THE TOWN OF BELMONT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Massachusetts Dover Amendment, Mass. Gen. Laws ch. 40A § 3 (1997), which forbids local communities from applying zoning ordinances or by-laws that "prohibit, regulate, or restrict the use of land or structures for religious purposes," is not a permissible accommodation of religion, but rather a direct benefit for religion that violates the Establishment Clause of the First Amendment.

2. Whether the Belmont Zoning By-Law, which carries out the mandate of the Dover Amendment, violates the Establishment Clause.

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REPLY

While it is rare that a reply is necessary at the certiorari petition stage, it is absolutely necessary in this case where the Respondents have misrepresented the record below, the status of the law were this Court to invalidate the Dover Amendment, and the power of Massachusetts local governments to determine zoning requirements.

Moreover, it bears repeating that the Massachusetts Dover Amendment is not a generally applicable, neutral scheme, but rather an arbitrary collection of exceptions to the general law, which includes one for "religious purposes" that triggers close Establishment Clause scrutiny. The Respondents' reasons to deny certiorari are not persuasive.

I. The Respondents' Laches and Remedies Arguments Are Red Herrings

Respondents make the specious argument that because they have completed and opened the Temple, Resp. at 13, this Court should not consider the constitutionality of the Dover Amendment. Respondents fundamentally misunderstand the operation of local zoning laws and apparently the posture of this case.

There are no obstacles to relief that would counsel in favor of denying the petition. First, the scope of the remedy in the event of a violation of the Establishment Clause is simply not before this Court. The court below never addressed the remedies issue.

Second, Respondents attempt to create the false impression that Petitioners sat on their rights for seventeen months while the Temple was built. The facts reveal otherwise. The building permit was issued on October 29, 1997, and the complaint was filed less than eight months later on August 25, 1998. *See* Appellate Record Below at 4. At the time of filing, there was only bare site preparation. Thus, the Church was fully aware of the constitutional challenge to its building long before the project advanced to any significant degree.

Third, Respondents' arguments about laches did not dissuade the courts below from proceeding onto the merits. If Respondents were correct that laches now prevents this Court from addressing the constitutionality of the Dover Amendment, churches would have an incentive to build swiftly in the face of any Establishment Clause challenge on the ridiculous theory that a completed building is a bar to appellate review of the constitutionality of the laws governing construction. The Church was fully aware of this challenge and assumed the risks imposed by the Establishment Clause when it moved forward expeditiously.

Finally, it is an amazing misunderstanding of zoning law to believe, as Respondents apparently do, that demolition is the only available remedy in a dispute over the constitutionality of a zoning law. Were this Court to hold that the Dover Amendment violates the Establishment Clause, a wide range of remedies would be on the table on remand, from demolition of the building to requirements that the Temple expand neither its building nor its parking lot and that the Church minimize traffic, noise, and light pollution to the maximum extent in the interest

of surrounding homeowners. As Petitioners have made clear since the filing of this lawsuit, they do not object to a religious building next to their homes, but rather the extraordinary negative secondary effects that flow from a huge building intended to draw large numbers of visitors in a residential neighborhood.

II. Were This Court to Find That the Dover Amendment Violates the Establishment Clause, Belmont Would Have the Power to Enforce Its Existing Generally Applicable, Neutral Zoning Regulations and Its Citizens the Power to Enact Others that Would Reduce the Harm to Petitioners

Respondents make the argument that invalidating the Dover Amendment would not improve the Petitioners' position, because the Church would have the benefit of a seventy-five-year-old zoning by-law that permits churches in residential neighborhoods. Resp. at 19-20. Were the Dover Amendment to be struck, however, the Petitioners would be in a much better position for two reasons. First, the full force of Belmont's zoning authority – and not the limited subset permitted under the Dover Amendment – would be applicable to the building at issue in this case. In the absence of the Dover Amendment, the neighbors will receive the benefit of the community's strong interest in crafting residential, livable neighborhoods. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (the government has a substantial interest in protecting the well-being, tranquility, and privacy of the home and therefore may regulate speech through a neutral time, place, and manner regulation).

Second, the citizens of Belmont will be free to enact generally applicable, neutral zoning regulations that aid Petitioners and others in their situation that they could not have enacted before. The law that the Respondents assumes springs into effect is a law that is seventy-five years old, *see Boyajian v. Gonzunis*, 212 F.3d 1, 30 (2000), and was passed at a time when there were, for example, no automobiles and therefore no parking problems and no traffic. The negative secondary effects now burdening Petitioners were unimagined. Because of the presence of the Dover Amendment, that by-law was never amended to reflect the evolution of zoning laws in general. In the absence of the Dover Amendment, the citizens of Belmont in a town meeting will have the ability to enact generally applicable, neutral rules to protect citizens like the neighbors in this case from the extreme negative secondary effects that flow from large buildings that generate intense traffic, noise, and light pollution in residential neighborhoods.

In particular, the citizens of Belmont will be able to consider generally applicable, neutral rules that prohibit further expansion of existing buildings, allow traffic control, and regulate the intensity of the use, any of which would improve the position of the Petitioners in this case. Therefore, striking the Dover Amendment places Petitioners in a much better position than before. As long as the Dover Amendment stands, the citizens of Belmont may not protect residential neighborhoods, including the Petitioners', against many negative secondary effects generated by large religious buildings with large parking lots and many visitors.

The Massachusetts cases cited by Respondents in support of their position that a decades-old Belmont by-law provision relative to religious uses would be the law if the Dover Amendment and the present, long-standing Belmont equivalent were struck down, do not in fact support that position. Those cases involved courts striking local government decisions to rezone (or alter the classification of) a parcel or parcels of land. They were stricken on the ground that they were illegal "spot zoning." *See Beal v. Building Comm'r*, 353 Mass. 640, 644, 234 N.E.2d 299, 302 (1968); *Mitchell v. Board of Selectmen*, 346 Mass. 158, 161, 190 N.E.2d 681, 683 (1963); *Cross v. Planning Brd.*, 345 Mass. 618, 621, 189 N.E.2d 189, 191 (1963). In those cases, the previously existing classification in effect before the spot-zoning remained in force after the spot-zoning was found illegal. This reasoning is irrelevant in the context of a constitutional challenge to a statute like the Dover Amendment.

On Respondents' theory, the presence of the unconstitutional Dover Amendment and its deterrence to zoning reform are insurance against a finding that it is unconstitutional. That cannot be right.

III. Respondents Fail to Note That Massachusetts Zoning Law Is a Matter of Local Right Under the Massachusetts Constitution's Home Rule Amendment, Mass. Const. Am. Art. 89 (1966)

Respondents make the remarkable claim that zoning law in Massachusetts is a creature of state law, and state law alone, as though citizens do not have broad state

constitutional power to determine the zoning requirements in their communities. Resp. at 28. For whatever reason, Respondents fail to mention that Massachusetts, like most states, has ratified a Home Rule regime, Home Rule Amendment, Mass. Const. Am. Art. 89 (1966), under which communities are given the constitutional right to shape their own zoning regulations in light of the needs of their citizens. *See generally Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 357-58, 294 N.E.2d 393, 408 (1973) (zoning power is independent power of local community). The right of local self-determination on zoning issues has been a pillar of zoning law in Massachusetts since at least 1966 when the Massachusetts Constitution was amended to include home rule. The Dover Amendment is in tension with the later-ratified Home Rule Amendment, and its violation of the Establishment Clause must be measured against the legal backdrop of home rule, not the Respondents' state-centered theory of zoning law.

Finally, Respondents argue that this Court should not address the Dover Amendment, because such a decision would have limited importance on the ground that "no other states have laws similar to the Dover Amendment." Resp. at 22. Their arguments in support of the Amendment, however, belie their argument that its constitutional validity is a question with limited importance. On their theory, there is no meaningful constitutional difference between the Dover Amendment and any other zoning privilege for religious buildings. Resp. at 26-27. There is no limiting principle to their assertion that zoning preferences for religious uses should be permitted "as a

matter of right" because courts should assume that zoning decisions "by local officials about which religious uses to permit are susceptible to unfairness as well as conscious or unconscious bias." Resp. at 26.

If the Respondent's theory in defense of the statute is left to stand, this Court can be certain that religious entities will push for ever-broadening zoning "rights" in all localities against imagined discriminatory motives. Indeed, they have achieved a degree of success through this very tactic with the Religious Land Use and Institutionalized Persons Act, H.R. 4862, 106th Cong. (2000). *See also* Naomi Schaefer, *Build It and They Will Sue*, Wall Street Journal, Dec. 1, 2000, § W, at 19 (land use privileges for religious entities "while helping some, may push aside the interests of homeowners. As difficult as these disputes may be to resolve, they are probably still best left to local – not higher – authorities."). Religious entities also will employ this Court's decision to deny certiorari, were it to deny, as an argument in favor of such privileges. *See, e.g., Parochial School Vouchers*, New York Times, Aug. 29, 1999, § 4, at 14. The Dover Amendment presents a weighty church/state matter of wide-ranging importance that requires this Court's attention.

CONCLUSION

For the reasons stated here and in the petition for certiorari, Petitioners respectfully request this Court grant certiorari to address the severe constitutional defects of the Dover Amendment. In the alternative, if this Court grants certiorari in *Children's Healthcare Is a Legal Duty, Inc. v. Min de Parle*, No. 00-914, on the question of the meaning of permissible accommodation, Petitioners respectfully request this Court hold this case for consideration in light of *CHILD, Inc.*

Respectfully submitted,

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